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Supreme Court of the United States

OCTOBER TERM, 1958

No. 136

JAMES ALONZO DRAPER, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Petition for Certiorari Filed December 16, 1957
Certiorari Granted June 30, 1958

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1 (File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. CR. 15063

THE UNITED STATES OF AMERICA, *Plaintiff*,

vs.

JAMES ALONZO DRAPER, *Defendant*.

Indictment—Filed Oct. 3, 1956
Transportation and Concealment of Narcotics Illegally Imported, 21 USC 174

The grand jury charges:

That on or about the 9th day of September, 1956, in the City and County of Denver, in the State and District of Colorado, JAMES ALONZO DRAPER did fraudulently and knowingly receive, conceal, sell and facilitate the transportation and concealment of a quantity of a narcotic drug, to-wit, 865 grains of heroin, after said heroin had been imported and brought into the United States, knowing the same to have been brought in contrary to law, in violation of 21 USC 174.

A True Bill,

CHARLES LEWIS SAYRE
Foreman.

DONALD E. KELLEY
United States Attorney

(File endorsement omitted)

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2 IN THE UNITED STATES DISTRICT COURT

Motion for the Return of Seized Property and the Suppression of Evidence—Filed Oct. 17, 1956

James Alonzo Draper, the defendant herein, states and alleges by his attorney:

1. That the defendant was the possessor of certain property on the morning of September 9, 1956, to-wit: one

white envelope containing heroin, one manila envelope containing heroin, and one hypodermic syringe.

2. That two law enforcement officers of the United States, whose true names are unknown to the defendant, on the morning of September 9, 1956, at the premises known as Union Station, 17th Street and Wynkoop, in the City and County of Denver, in the District of Colorado, unlawfully seized and took said property from the defendant.

3. That the said officers seized and took the said property against the defendant's will and without a warrant for his arrest or a warrant for the search of his person or luggage.

WHEREFORE, defendant prays that this Court order the party or parties having possession of the said syringe to return it to the defendant and that the said syringe and said envelopes containing heroin be suppressed as evidence against the defendant in any criminal proceeding.

JOHN J. ALTHOFF
John J. Althoff
Attorney for Defendant
711 E. & C. Bldg.
Denver, Colorado
Phone: CH 4-0728

(File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

(Title omitted)

Transcript of Proceedings on Motion for Return of Seized Property and Suppression of Evidence (Excerpts from)—October 26, 1956

Excerpt of proceedings had before HONORABLE WILLIAM LEE KNOUS, Chief Judge, United States District Court, District of Colorado, in Denver, Colorado, at the Post Office Building, in Courtroom A, on October 26, 1956, at 1:30 o'clock, p. m.

Appearances

HONORABLE JOHN PFEIFFER, Assistant United States Attorney, appearing for the Government.

JOHN J. ALTHOFF, Esq., Attorney at Law, Denver, Colorado, appearing for the Defendant.

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4 The Court: Are you ready to proceed in the Draper case?

Mr. Althoff: If it please the Court, I will proceed by calling the defendant and establishing the facts that are alleged in the motion.

The Court: Very well, he may be sworn and take the stand.

JAMES ALONZO DRAPER,

the Defendant, being duly sworn in his own behalf, testified as follows:

Direct Examination

By Mr. Althoff:

Q. Will you give your name and address to the Court? A. My name is James A. Draper. I live at 2426 Welton.

Q. Were you at the Union Station, 17th and Wynkoop, Denver, Colorado, on the morning of September 9 I believe it was, a Sunday morning of this year? A. Yes.

Q. Did two men forcibly take envelopes containing—

Mr. Pfeiffer: Just one moment. Ask him what happened. Let him tell what happened.

Mr. Althoff: All right.

Q. Mr. Draper, will you describe the circumstances which took place? A. I was in the passenger tunnel
5 at Union Depot. One man grabbed me by each arm and proceeded, one man entered my left coat pocket, and the other man took my grip from my right hand and proceeded to search my grip, and they both took articles that later on it was alleged to have heroin, narcotics.

Q. Do you know who these men were? A. One is sitting there, the one on the right.

Q. Which one? A. The one on the right.

Q. Your right? A. My right.

The Court: He is pointing to Mr. Marsh, I assume. Is this the one you are talking about?

The Witness: Yes.

The Court: That is Mr. Marsh.

Mr. Althoff: Let the record show that the defendant identified Mr. Marsh as one of the men that accosted him.

Q. Did these men serve you with a copy of a warrant for your arrest? A. No. They never served me with any identification.

Q. Did they speak to you before they removed these various articles from your possession. A. Yes.

6 Q. What did they say? A. They asked my name.

Q. And what did you answer? A. I said, "James Draper".

Q. What happened next? A. They proceeded to go through the motions that I described before.

Q. Now, did you consent to their removing these various articles from your possession? A. No.

Mr. Althoff: That is all.

The Court: I would like to know, I do not know yet what was taken from him and where it was located, whether it was in his pocket or where it was.

The Witness: It was in my coat pocket.

The Court: What was taken from you?

The Witness: Two envelopes.

The Court: This motion says something about a hypodermic syringe.

The Witness: That was taken from my grip.

The Court: Where were the envelopes?

The Witness: In my coat pocket.

The Court: And the syringe was in your grip in your suitcase?

7 The Witness: In my grip.

The Court. Was it opened there in your presence at the same time?

The Witness: It was opened at my side.

The Court: I mean that was opened and the search made right there?

The Witness: It was opened by the gentleman I just identified. The grip was opened by the gentleman that I identified.

The Court: These envelopes contained heroin, as I understand, is that right?

Mr. Althoff: The defendant infers they contained heroin.

The Court: I won't pursue that. The Government may cross-examine.

Cross Examination

By Mr. Pfeiffer:

Q. What was in these envelopes that they took from you? A. Allegedly heroin. I am not a chemist. I don't know.

Q. Who owned what was in those envelopes? A. I do.

Q. They were yours? A. The envelopes were mine.

Q. Now, the substance in the envelopes is yours?

8 A. Yes.

Q. Whether it is heroin or whether it is milk sugar, is that correct? A. Yes.

Q. Where do you live? A. 2426 Welton.

Q. How long have you lived there? A. Since the last of August, first of August—correction, please.

Q. First of August? A. Yes.

Q. Where had you come from when you got off the train? A. Chicago, Illinois.

Mr. Althoff: If the Court please, I object to this.

The Court: Unless there is some purpose, I think I will sustain the objection. What we are interested in here is not the general history of the case but whether this search was unlawful.

Mr. Pfeiffer: I believe I am entitled to show where he came from.

The Court: What has that to do with it?

Mr. Pfeiffer: To show probable cause.

The Court: You might indicate to me the relevance.

9 Mr. Pfeiffer: The Government believes—

The Court: The question here is—

Mr. Pfeiffer: All right, I won't go into it at the present time.

The Court: I do not see where that is particularly relevant now. It may be in a moment but not now.

Q. At the Union Station you got off the train, didn't you? A. Yes.

Q. And where did you go when you got right off the train? A. I walked down the stairs.

Q. You walked down the stairs? A. Yes.

Q. This is down at the Union Depot here in Denver? A. Yes.

Q. And at that time when you got down the stairs you started up the other stairs, didn't you? A. No.

Mr. Althoff: I am going to object to this, if the Court please.

The Court: This is all right to show what happened. I gather this was right at the time of the search. I infer it is.

Q. Now, you got off the train and walked down
10 the steps? A. Yes.

Q. And then at that time Agent Marsh over here and did Mr. Seaton—was that the other gentleman? A. No.

Q. That is not the other gentleman? A. No.

Q. Two people, anyway, one of them was Agent Marsh, came up to you, did they? Did they or didn't they? A. Two people. This gentleman here.

Q. Was there another person with him? A. Yes. I can identify him too.

Q. What did they say to you at that time? A. "What is your name?"

Q. "What is your name?" A. Yes.

Q. What did you answer to them? A. "James Draper".

Q. Didn't you say your name was Francis Smith? A. Yes, at one time.

Q. You said when they asked you—

Mr. Althoff: I object to that.

The Court: Objection overruled. This is proper. This was at the time of the search. The objection will
11 be overruled.

Q. The first time that they came— A. I might say Carl Francis was the person I was to deliver the envelope to, and I asked him if his name was Carl Francis.

Q. You asked Mr. Marsh if his name was Carl Francis? A. And then the other gentleman on my right, he said, "What is your name?" I said, "James Draper", and then he went into my hip pocket and pulled my billfold out with my identification.

Q. Pulled your billfold out? A. Yes.

Q. Didn't you say your name was Francis Smith? A. No.

Q. Now, were you ever placed under arrest?

The Court: Ask him what was said.

Q. When you came up, when they first came up to you just tell me what was said. A. When they first approached me?

Q. That's right. A. The first thing they said?

Q. Yes. A. "What is your name?" And I said, "James Draper."

Q. At that point didn't Agent Marsh say, "You
12 are under arrest"? A. No.

Q. Didn't he show you his badge? A. No.

Q. He didn't? A. No.

Q. Now, what else happened then? What did they say to you? A. They proceeded to go through my bag. They never said anything.

Q. They didn't say anything more? A. Not asking me questions.

Q. Did the other person that was with Agent Marsh ask for your billfold? A. No.

Q. Did you give him your billfold? A. No.

Q. Did they take your billfold? A. Absolutely did.

Q. Where was your billfold? A. In my hip pocket.

Q. And they took it from you? A. Yes.

Q. Did you at any time see a badge? A. No.

13 Q. Did they at any time identify themselves? A. No.

Q. I may have made a mistake here. Did you tell them your name was Carl Francis? A. No.

Q. You didn't? A. No.

Mr. Pfeiffer: No further questions.

The Court: Do you want to ask him further questions?

Mr. Althoff: No redirect. Your Honor, it is our contention that the burden is upon the Government to show probable cause.

The Court: I think you have offered prima facie case to support your motion. I will hear from the Government.

---

14 JOHN W. MARSH,

a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct Examination

By Mr. Pfeiffer:

Q. Would you please state your name? A. John W. Marsh.

Q. Where do you live, Mr. Marsh? A. Denver, Colorado.

Q. What is your occupation or profession? A. A narcotics agent for the U. S. Treasury Department.

Q. How long have you been so engaged? A. 29 years.

Q. Were you so engaged in the months of August and September of this year? A. I was.

Q. Now, Agent Marsh, were you assigned or are you in charge of a case entitled James Alonzo Draper? A. I am.

Q. Agent Marsh, when did you first receive information in regard to James Alonzo Draper? A. On about September 3, 1956.

Q. What was that for? A. I received information from a reliable source that James Draper was living upstairs at 2426 Welton Street and was peddling Heroin.

Mr. Althoff: I am going to object to that. It is hearsay. If they want to establish these facts, they should bring forth the informer so I have an opportunity to cross-examine that informer.

The Court: Well, I think there may be some exceptions about that, but you may be entitled to demand the name of the informer I think under special circumstances. Do you have any law with you on that?

Mr. Pfeiffer: We have law on the situation that a special employee of the Bureau of Narcotics is confidential and does not have to be disclosed, but at this time I will disclose the person.

Q. Agent Marsh, who was the person you talked to? A. James A. Hereford.

Q. Where is James A. Hereford at the present time? A. He has been dead since September 13, 1956.

Q. Now, would you go on with the information that you received on September 3? A. The information was that James A. Draper or James Draper was peddling Heroin to several addicts here in Denver. Later on September 7 I received additional information from the same source that Draper had gone to Chicago the day before, which was September 6, that he had gone by train, that he was going to bring back approximately three ounces of Heroin, that he would return to Denver either on the morning of the 8th of September or the morning of the 9th of September also by train. That he was wearing a light-colored raincoat, brown slacks, and black shoes, that

he was carrying a tan zipper bag. That as a further description that he habitually walked real fast.

On September 8 I went to the Union station.

Mr. Althoff: I make a motion to strike his entire answer up to this point because it is all hearsay.

The Court: The objection will be overruled. If you will look at the cases, this is the kind of evidence that is admissible on a question of proper cause I think.

Mr. Pfeiffer: That's correct.

The Court: We will see what it leads to.

A. I watched at the Union Station, met all the incoming trains from Chicago on September, and the person that was described to me did not appear.

Q. Who else was present at that time? A. Agent Gress, Agent Ford, and Detectives—

Q. Agent Gress and Agent Ford are Agents of what?

A. Of the Bureau of Narcotics, and Detective Bates,
17 he is with the Denver Police Department.

Q. Under whose supervision were they acting that day? A. Under mine. On the following morning I went to the Union Station with Sergeant Seaton of the Denver Police Department, Detectives Forden and Bloom and also the two Narcotics Agents Ford and Gress. We stationed ourselves at different positions around the terminal, and at 8:20 a.m. Sergeant Seaton gave me a signal that he had spotted our suspect, and I turned around and saw the defendant coming from the pullman section of the California Zephyr. He was walking fast and was carrying a light tan bag. He had on a light raincoat, gray hat, brown slacks, and black shoes. He was the same weight, height and age as the man who had been described to me. We followed him down the stairway into the subway, walked up behind him. I walked on his right, showed him my official badge, and told him he was under arrest. Sergeant Seaton at the same time took ahold of his left arm, identified himself to him. The first thing I asked him, "What is your name?" And he said, "Carl Francis." I said, "Do you have any identification on you?" Either he produced his billfold or I removed it from his pocket, and in the billfold I found I had James A. Draper.

At the same time Sergeant Seaton held the defend-
18 ant's left hand out, and he was holding in his hand

two paper packages which we later examined and found contained Heroin. He also had a smaller paper bundle in his pocket containing a few grains of Heroin. All together there were 865 grains of Heroin, approximately two ounces.

Q. You say he was carrying a leather zipper bag? A. Yes, light tan leather zipper bag.

Q. Did you open that bag? A. Yes, we opened the bag.

Q. When did you do that? A. I opened it first right there at the depot.

Q. In whose presence did you open it? A. In the presence of the defendant and Sergeant Seaton.

Q. What did it contain? A. It contained toilet articles and a hypodermic outfit.

Q. Hypodermic syringe? A. Yes.

Q. And after that what did you do if anything with the defendant? A. We took him to the office of the Bureau of Narcotics, gave him all the warnings that he was not, he did not have to make a statement, that any statement he made could be used against him.

19 Q. Did you place him in custody? A. Yes.

Q. Now, Mr. Hereford, what was he in relation to the Bureau of Narcotics in common vernacular? A. He was what we call a special employee. He furnished information, and we paid him small sums of money for the information.

Q. How long had he been a special employee prior to this time? A. I believe about six months.

Q. Had he furnished information to you before? A. Yes.

Q. Did you corroborate that information? A. Yes.

Q. What did you find? A. I found that his information was always reliable.

Mr. Pfeiffer: I have no further questions.

Cross Examination

By Mr. Althoff:

Q. Officer, what caused you to pick out this man among all the people that disembarked from that train? A. Well, first, he was a negro, second, he was about 27 years of age, third, he was about 5 foot 8 inches in height, fourth, he weighed about 160 pounds, fifth, he had light brown complexion, sixth, he had a gray felt hat, seventh, he had a light

tan raincoat, eighth, he was carrying a light tan
20 leather zipper bag. In fact, he fit the description that I had very accurately of the suspect.

Q. Where did you obtain the description? A. From Robert Hereford.

Q. And he is the informer in this case? A. Yes.

Q. In other words, if it wasn't for this informer, there would be absolutely no facts that you personally knew that would give grounds for probable cause to arrest this man, all the facts you have were gained from this informer, is that not right? A. That's right. That is where the information came from.

Mr. Althoff: That is all.

The Court: Any further questions?

Mr. Pfeiffer: No further questions.

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21 GEORGE L. SEATON,

a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct Examination

By Mr. Pfeiffer:

Q. Would you please state your name? A. George L. Seaton.

Q. Where do you live, Mr. Seaton? A. Denver, Colorado.

Q. What is your occupation or profession? A. Sergeant, Police Department, City and County of Denver.

Q. Sergeant, do you know James Alonzo Draper? A. Yes.

Q. Do you know the defendant here? A. Yes.

Q. When did you first see him? A. About 8:20 a. m. on September 9, 1956.

Q. And where were you at that time? A. Union Station Denver, railroad station.

Q. What were you doing there? A. I was there with Agent Marsh.

Q. And why were you down there? A. I was there to attempt to apprehend a party, a party that we had a description of.

22 Q. Who was the party? A. I only had the description.

Q. What was that description? A. Negro, light brown complexion, wearing a gray hat, nylon light tan-colored raincoat, black shoes, brown trousers, and might possibly be carrying a light tan zipper bag.

Q. Did you see such a person that day? A. Yes, I did.

Q. What happened then, if you will just relate what happened. A. The party that I observed that answered the description was about the last one to step off the train. He immediately headed for the stairway to go down to the tunnel to start toward the street. Agent Marsh was near me, and I spoke to him and told him that I thought our suspect had just alighted, and he saw him also. We started down behind him. He was walking very fast. I went up on his left side, Agent Marsh on his right. I took him by the left arm, and I had this badge and my identification, and I said, "Police Officer. We would like to talk to you." Agent Marsh had his badge, showed him his identification, identified himself as a Narcotics Agent. I believe Agent Marsh asked him his name. He stated, "My name is Carl Francis."

Then we asked him to step back inside the stairway to be out of the way of traffic moving there, and he asked
23 him for his identification. I don't remember whether he, Draper, removed it or whether Agent Marsh removed it from his hip pocket. I believe it was the right hip pocket, and the identification proved to be James A. Draper that he was carrying.

Q. Continue right on. A. From the time I spotted Draper alight from the train he kept his left hand in his raincoat pocket and never removed it carrying the zipper bag in his right hand walking very fast. I asked him what he had in his coat pocket. He didn't say a word, so, I tried to pull it out, and he was reluctantly holding his hand in the raincoat pocket, and I could feel that his fist was clenched. As I put a little more pressure he gradually let it come out, and he had these two glacene paper bags with a substance in those, and I took those, immediately gave them to Agent Marsh. There was another small paper in the bottom of the pocket which I brought out myself and handed to Agent Marsh.

Q. And you turned that over to Agent Marsh? A. Yes, sir.

Q. What was done with the leather bag? A. It was searched there in the tunnel. A hypodermic outfit and some clothes and toilet articles were in the bag.
24 That was taken with Draper to the Narcotics Bureau office.

Mr. Pfeiffer: No further questions.

Cross Examination

By Mr. Althoff:

Q. Sir, would you mind repeating who you work for? A. Police Department, City and County of Denver.

Q. How did you happen to meet Mr. Marsh, and how did you happen to go on this mission to the depot with Mr. Marsh? A. Mr. Marsh called my home on the evening of September 8 approximately 8:00 p.m. I was at the ball park, and my wife called and stated that he wanted to get in touch with me. I called him at his home. He wanted to know if I had a couple of men I could spare on Sunday morning to meet some trains at the railroad station. I stated yes, I thought so; if not, I would be there myself. I contacted one detective. I didn't know exactly when the other one would come in since it was Sunday. We work irregular shifts. So, I went down myself.

Q. In other words, you were cooperating with Mr. Marsh, with the Federal authorities? A. Yes. He said they expected possibly someone to come in on the train.

Q. And he sought your cooperation, and you gave it to him? A. Yes.

Q. Now, will you tell the Court what facts you had
25 by personal observation which would give rise to probable cause to arrest this man without a warrant?

Mr. Pfeiffer: That calls for a legal conclusion.

The Court: He asked him what facts he had.

Mr. Pfeiffer: Facts, that's right.

The Court: I think he can answer the question. Did you understand the question.

The Witness: Repeat it, please.

(The reporter read the last question.)

Q. What facts did you have? What facts did you gain by your personal observation which gave basis for the conclusion that there was a probable cause to arrest this man

without a warrant? A. Well, in the first place, Agent Marsh told me this party might possess heroin. The description fit very closely.

Q. I don't understand this description.

The Court: I think he is answering the question.

Mr. Althoff: All right, your Honor.

Q. Continue. A. And as he got off the train he held this left hand in his coat pocket as if he had something. He seemed in a hurry walking very fast as if he wanted to get away from the area.

Q. At the time you knew of no other facts other than the facts that Mr. Marsh outlined?

26 The Court: No, he just stated the facts. You can ask him if there were any other facts in addition to what he stated that led to that conclusion.

Q. Are there any other facts? A. No other facts.

Q. Did you ever see the defendant before he disembarked from this train? A. That was the first time I ever saw the man.

Mr. Althoff: That is all.

Redirect Examination

By Mr. Pfeiffer:

Q. You say you were down there—

Mr. Pfeiffer: Well, this may be on direct examination, but I would like to clarify it if I may ask a couple of questions that may be direct.

The Court: All right.

Q. Who else was down there with you?

The Court: You mean in the whole station or where?

Q. When you originally went down to the Union Depot who was with you? A. Detective Wilbur Norton, Detective Frank Orville, and myself. We met Agent Marsh, Agents Gress and Ford at the Depot.

Q. Now, where did you and Mr. Marsh go? A. Mr. Marsh and I stayed near the front end of the train

27 where it would stop approximately, near the stairways that go into the tunnel. I believe the other two Agents paired off down toward the other end of the train.

Q. By the other end? A. The rear end.

Q. The rear end of the train? A. The front end. I believe they backed in.

Q. Were all four of you together? A. No. I believe they were paired up.

Q. What was happening at this time down in the Union Station, do you know? Was there a strike on? A. Yes, there was.

Q. And where were the trains stopping? A. Well, the trains I think would stop in the yards at first, and then they didn't have sufficient crews, and it seemed as though some of the railroad officials would ride in with the train or something to that effect.

Q. Were people alighting from the train back out there? A. Yes.

Q. Did one of the groups of two go back there? A. Yes.

Mr. Pfeiffer: I have no further questions.

Mr. Althoff: No further questions.

28 The Court: You may step down then.

Mr. Pfeiffer: I do not know if this is proper, but I neglected to ask the defendant one question on cross examination. Would it be proper to recall him for one question?

The Court: He may take the stand.

JAMES ALONZO DRAPER,

the defendant, having been formerly sworn, resumed the stand, and testified as follows:

Cross Examination

By Mr. Pfeiffer (Continued):

Q. You are the same James Draper that has previously testified in this matter, are you not? A. Yes.

Q. Mr. Draper, have you ever been convicted of a felony? A. Yes.

Q. What was that felony? When was that? A. Possession of narcotics.

Q. When was that? A. At what time?

Q. Yes, in what year? A. 1950.

Q. And you say narcotics, what do you mean, what type of narcotics? Was it heroin? A. I am not a chemist. I don't know.

Q. Did they charge you with heroin? A. Yes. I
29 pleaded guilty.

Q. You pleaded guilty to that? A. Yes.

Mr. Pfeiffer: No further questions. The Government rests, your Honor.

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30 Reporter's Certificate to foregoing transcript omitted in printing

31 IN THE UNITED STATES DISTRICT COURT

Honorable Donald E. Kelley, United States Attorney for the District of Colorado; John C. Pfeiffer, Assistant United States Attorney, Post Office Building, Denver, Colorado, for The United States of America; John J. Althoff, Esquire, 711 E. & C. Building, Denver, Colorado, for Defendant.

Memorandum Opinion and Order on Motion for Return of Seized Property and Suppression of Evidence—Dec. 11, 1956

Knous, Chief Judge.

This matter arises upon the timely motion of defendant under Rule 41(b) F.R.Cr.P. "for the return of seized property and the suppression of evidence." The defendant has been indicted for receiving and facilitating the transportation of heroin in violation of 21 U.S.C. § 174. By his motion he alleges in effect that certain law enforcement officers committed an illegal and unreasonable search of his person and possessions, and thereafter seized from him a quantity of heroin and a syringe. His motion seeks to suppress evidence of the heroin and a return to him of the syringe.

A hearing had upon the motion disclosed the following facts: John W. Marsh, a narcotics agent for the U. S. Treasury Department, received information from one James A. Hereford, since deceased, on or about September 3, 1956,
that the defendant was "peddling" heroin to ad-
32 dicts in Denver. This was the first notice Agent Marsh or his department had of the defendant and his alleged activities. Mr. Hereford had been a special employee of the Bureau of Narcotics for some six months prior to that time, receiving small sums of money for in-

formation. His information in the past had always been corroborated and found to be reliable.

Thereafter, on September 7, 1956, Agent Marsh received information from the same source that the defendant had left by train for Chicago the day before and would return by train to Denver on either the morning of September 8 or 9, with a quantity of heroine. A complete description of the defendant and his wearing apparel was given, and also that he was carrying "a tan zipper bag" and habitually walked "real fast."

Agent Marsh and other law enforcement officers went to the Denver Union Station on September 8, but the defendant did not show up. The surveillance was repeated on the morning of the ninth. The defendant at that time was seen to alight from a train. He fit the description given Agent Marsh precisely, was walking in a hurried manner, carrying the zipper bag in his right hand, and with his left hand thrust in his coat pocket. Marsh, in conjunction with Detective Seaton of the Denver Police Department, approached the defendant, showed him his identification badge, and placed him under arrest. Following this, the defendant was asked his name, his reply was false; his billfold was taken from him which disclosed his correct identity; his left hand was pulled from his coat pocket disclosing two paper packages containing heroin, and his zipper bag was searched disclosing the syringe. Thereafter, he was taken to the office of the Bureau of Narcotics and retained in custody.

33 The officers proceeded as above set forth without a warrant of arrest or search warrant.

The Government seeks to sustain the search and seizure upon the ground that it was made incident to a lawful arrest. *United States* v. *Rabinowitz*, 339 U.S. 56 (1950); *United States* v. *DiRe*, 332 U.S. 581 (1948); *Harris* v. *United States*, 331 U.S. 145 (1947).

It was formerly the well-recognized rule that state law governed the validity of an arrest made without warrant. *Johnson* v. *United States*, 333 U.S. 10 (1948); *United States* v. *DiRe*, supra. However, by Public Law 728, Sec. 104, 70 Stat. 570, July 18, 1956, Congress has now made uniform the law governing arrests by narcotic agents in these circumstances, by providing that such agents, among others, may

> "(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs . . . where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

Thus, we are faced with the question of whether Agent Marsh and those under his direction, had reasonable grounds, or probable cause, to believe that the defendant had committed or was committing an offense.

It is strongly urged by the defendant that there was no probable cause for the arrest, for it is alleged, probable cause cannot be based upon uncorroborated hearsay information standing alone. *Worthington* v. *United*
34 *States*, 166 F. (2d) 557, 6 Cir., (1948); *Wisniewski* v. *United States*, 47 F. (2d) 825, 6 Cir., (1931); *United States* v. *Clark*, 29 F. Supp. 138, D.C. Mo., (1939); *United States* v. *Hill*, 114 F. Supp. 441, D.C. D.C., (1953); *United States* v. *Castle*, 138 F. Supp. 436, D.C. D.C., (1955); *United States* v. *Turner*, 126 F. Supp. 349, D.C. Md., (1954). Apparently, were the Second Circuit to be faced with the precise question, its view would be contrary. *United States* v. *Li Fat Tong*, 152 F. (2d) 650, (1945); *United States* v. *Heitner*, 149 F. (2d) 105, (1945), cert. den. 326 U.S. 727; *Somer* v. *United States*, 138 F. (2d) 790, (1943); *United States* v. *Gowen*, 40 F. (2d) 593, (1930), reversed on other grounds, *Go Bart Co.* v. *United States*, 282 U.S. 344. See also *Cannon* v. *United States*, 158 F. (2d) 952, 5 Cir., (1946), cert. den. 330 U.S. 839; *King* v. *United States*, 1 F. (2d) 931, 9 Cir., (1924).

An examination of the authorities by the Court has disclosed no decisions of the United States Supreme Court or the Tenth Circuit Court of Appeals directly touching upon this question. The Government contends that a phrase contained in the decision of *McIntire* v. *United States*, 217 F. (2d) 663, 666, 10 Cir., (1954), cert. den. 348 U.S. 953, to the effect that a peace officer may arrest without warrant on reasonable, trustworthy information, is controlling here. The phrase, however, is taken from the context of a decision which was not rendered upon the force to which the

Government attributes the phrase. However, the efficacy of the principal authority relied upon by the defendant in support of his contention, *Worthington* v. *United*
35 *States,* supra, as such authority, is open to some doubt. The decision of *Grau* v. *United States,* 287 U.S. 124 (1932), in so far as it held that a search warrant may issue only on facts competent before a jury on the trial of the offense, met with express disapproval in *Brinegar* v. *United States,* 338 U.S. 160, ftn. 13, 174-175 (1949). The substance of *Worthington* flowed from this principle enunciated in *Grau.* How much of the former fell with the latter is not easily determinable.

Be that as it may, in the opinion of the Court, under the facts here attending, the controversy is more academic than real. The term "probable cause" was given as close a definition, or, perhaps, more correctly, as close a "meaning" as the phrase itself permits, in *Brinegar* v. *United States,* supra. There, at pages 175 and 176 of 338 U.S., the Supreme Court stated:

> " 'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.' *McCarthy* v. *De Armit,* 99 Pa. St. 63, 69, quoted with approval in the *Carroll* opinion, 267 U.S. at 161. And this 'means less than evidence which would justify condemnation' or conviction, as Marshall, C.J., said for the Court more than a century ago in *Locke* v. *United States,* 7 Cranch 339, 348. Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Carroll* v. *United States,* 267 U.S. 132, 162.
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> 36 "These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambig-

> uous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."

Applying these principles to the instant action, it is the opinion of the Court, that the Government has shown that Agent Marsh acted with probable cause in arresting the defendant, i.e., that he was acting not upon mere suspicion but in fact had reasonable grounds for his belief in the guilt of the defendant.

Agent Marsh has a long record of service in ferreting out violators of the narcotic laws. The name of his informer was disclosed at the hearing had upon this motion. By the uncontradicted testimony of Agent Marsh, it was established that in his personal knowledge and through his own corroboration, the information supplied him in the past by this informer was reliable. The day which the defendant alighted from the train in Denver was upon one of the days specified by the informer that such event would take place. The description of the defendant as observed by Agent Marsh fit precisely that described to him. The gait of the defendant and the "luggage" carried by him were observed as described. As he
37 walked, the defendant kept his left hand, which upon search disclosed the heroin, thrust in his coat pocket. Thus, the one remaining fact contained in the information, albeit the all important fact, not observed by Agent Marsh, was the presence of the heroin.

From these facts, it cannot be said that Agent Marsh acted other than as "a cautious man in the belief that the party [was] guilty of the offense with which he [was] charged." *Stacey* v. *Emery*, 97 U.S. 642, 645 (1878). A belief in the presence of an unobserved fact contained in information deemed, by reason of corroboration of similar information received from the same source in the past,

as trustworthy where all the other facts contained in the information have been observed as true, is not the unreasonable belief of an uncautious man.

The arrest having been lawfully made, the incident search and seizure was not in violation of the Fourth Amendment to the Constitution. Accordingly, it is

ORDERED AND ADJUDGED that defendant's Motion for the Return of Seized Property and the Suppression of Evidence, be, and the same is hereby denied.

DATED at Denver, Colorado, this eleventh day of December, A. D. 1956.

WILLIAM LEE KNOUS
William Lee Knous,
Chief Judge.

(File endorsement omitted)

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38 IN THE UNITED STATES DISTRICT COURT

Order of Judgment and Commitment—Jan. 30, 1957

It appearing that the defendant, JAMES ALONZO DRAPER, appeared in person and by counsel on the 12th day of October, 1956, and being arraigned, pleaded not guilty to the charges contained in the Indictment, and that thereafter on the 16th day of January, 1957, following trial to the court, defendant was found guilty of the offense of transportation and concealment of narcotics illegally imported, 21 USC 174; and that on, to-wit, the 30th day of January, 1957, the United States Attorney filed a Supplemental Information setting forth one prior conviction of said defendant of an offense, the penalty for which is provided in Section 174, Title 21 USC, and the defendant having affirmed in open court that he is identical with the person previously convicted in conformity with the provisions of the aforementioned Section 174, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the court;

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a period of ten (10) years from this date on the Indictment herein.

39 It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

EWING T. KERR
United States District Judge
Assigned

(File endorsement omitted)

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40 IN THE UNITED STATES DISTRICT COURT

Notice of Appeal—Filed Jan. 31, 1957

COMES Now the defendant herein by counsel and states:

1. That defendant's name and address are: James Alonzo Draper, 2426 Welton Street, Denver, Colorado.

2. That defendant's court-appointed attorney herein is John J. Althoff, 711 Ernest & Cranmer Building, Denver, Colorado.

3. That the indictment herein charged said defendant with the transportation and concealment of narcotics illegally imported into the United States.

4. That this Court denied defendant's motion for judgment of acquittal on January 16, 1957, and entered a judgment of conviction of the crime charged in the indictment herein on January 16, 1957.

5. That the defendant herein was sentenced to ten years imprisonment on January 30, 1957.

6. That the defendant is presently confined in the County Jail for the City and County of Denver and the State of Colorado.

7. That the above named defendant hereby appeals to the United States Court of Appeals for the Tenth Circuit from the above-stated judgment.

Dated this 31st day of January, 1957.

JOHN J. ALTHOFF
John J. Althoff
Attorney for Defendant
711 E. & C. Bldg.
Denver, Colorado
CHerry 4-0728

(File endorsement omitted)

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41 IN THE UNITED STATES DISTRICT COURT

Order Granting Leave to File Appeal in Forma Pauperis—Jan. 31, 1957

This matter coming to the attention of the Court on the Motion and Affidavit in Forma Pauperis for Leave to File Appeal Without Prepayment of Fees, and the Court having examined said Petition and Affidavit, it is

ORDERED:

1. That the Court certifies that the appeal is taken in good faith and presents a substantial question.

2. That the defendant be permitted to file the Notice of Appeal without the prepayment of fees and costs, as provided by Section 1915, Title 28, U.S.C.

3. That the Clerk's Office prepare for filing in the United States Court of Appeals for the Tenth Circuit an original and three copies of the transcript of record, without the prepayment of the fees therefor.

4. That the Clerk include in the record on appeal the following:

(a) Indictment

(b) Defendant's Motion for the Return of Seized Property and the Suppression of Evidence

(c) Memorandum Opinion and Order

42 (d) Reporter's excerpt of proceedings had on October 26, 1956

(e) Judgment and Commitment

(f) Notice of Appeal

and transmit the original exhibits.

DATED at Denver, Colorado, this 31st day of January, A. D. 1957.

BY THE COURT:

WILLIAM LEE KNOUS
United States District Judge

(File endorsement omitted)

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43 **Clerk's Note Re Exhibits**

Plaintiff's Exhibits Numbered 1, 2, 2A, 2B, 2C and 3, are transmitted under separate cover herewith.

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44 **Clerk's Certificate to Foregoing Transcript**

(Omitted in printing)

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45 IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Order of Submission—May 15, 1957

Before Honorable Sam G. Bratton, Chief Judge, and Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard and was argued by counsel, John J. Althoff, Esquire, appearing for appellant, John S. Pfeiffer, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

46 IN THE UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5593 — September Term, 1957

JAMES ALONZO DRAPER, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court
for the District of Colorado

Opinion—September 12, 1957

John J. Althoff for Appellant.

John S. Pfeiffer, Assistant United States Attorney, (Donald E. Kelley, United States Attorney, was with him on the brief) for Appellee.

Before BRATTON, *Chief Judge,* and HUXMAN and MURRAH, *Circuit Judges.*

BRATTON, *Chief Judge.*

47 The indictment in this case charged that appellant fraudulently and knowingly received, concealed, sold and facilitated the transportation and concealment of 865 grains of heroin, after it had been imported into the United States, knowing it to have been brought in contrary to law. Appellant seasonably filed a motion to suppress as evidence two envelopes, certain heroin in the envelopes, and a hypodermic syringe, upon the ground that they had been taken from him by means of an unlawful search and seizure. A hearing was had upon the motion, at which evidence was adduced tending to establish these facts. John W. Marsh was an agent of the Bureau of Narcotics in Denver, Colorado. For approximately six months prior to September 3, 1956, James A. Hereford acted as a special employee for the Bureau in Denver. During that time, he furnished information to Marsh concerning violations of the narcotics act, for which he was paid small sums of money; and the information furnished was always found

to be reliable. On September 3, Hereford informed Marsh that appellant lived upstairs at a certain address in Denver; and that he was peddling heroin to several addicts in Denver. Four days later, on September 7, Hereford informed Marsh that appellant had gone to Chicago the previous day; that he had gone by
48 train, that he was going to bring back approximately three ounces of heroin; and that he would return by train either on the morning of the 8th or the morning of the 9th. And Hereford described appellant as a Negro, about 27 years of age, about 5 feet and 8 inches in height, weight about 160 pounds, and had a light brown complexion; that he wore a gray felt hat, brown slacks, black shoes, and a light brown raincoat; that he was carrying a light tan leather zipper bag; and that he habitually walked very fast. On the morning of September 8, Marsh and other officers went to the union station in Denver and watched incoming trains but they did not see anyone meeting the description which Hereford had furnished. On the following morning, Marsh and other officers again went to the station. Appellant alighted from a train arrivng from Chicago. He met the description which Marsh previously received from Hereford. He walked very fast, was carrying a tan zipper bag, and had his left hand in his raincoat pocket. Without any warrant of arrest or search warrant, Marsh and a member of the police force walked up behind appellant. One took him by the left arm and the other by the right. They identified themselves and asked appellant his name. He replied that his name was
49 Carl Francis. Marsh inquired whether he had any identification. His billfold was removed from his pocket and through that source Marsh found that he was in fact appellant. Marsh told him that he was under arrest; and with some difficulty, his left hand was pulled out of the raincoat pocket. His clenched fist was around two glassine paper bags which contained approximately one ounce of heroin each. The zipper bag was opened by the officers and it contained among other things a hypodermic syringe. The testimony establishing these facts was given by Marsh. Hereford died before the hearing and therefore did not testify. The motion was denied,

146 F. Supp. 689; the seized effects were admitted in evidence on the trial of the case; appellant was convicted; and from the sentence imposed, he appealed.

It is urged that the judgment should be reversed for error in denying the motion to suppress the evidence. The argument is that the arrest of appellant was unlawful; that since the arrest was unlawful, the search and seizure were unlawful; and that the incriminating evidence obtained by means of the search and seizure was inadmissible. Section 104(a)(2) of the Narcotic Control Act of 1956, 70 Stat. 567, 26 U.S.C. § 7607(2), pro-
50 vides in presently pertinent part that an agent of the Bureau of Narcotics may make arrests without warrant for violations of any law of the United States relating to narcotic drugs where such agent has reasonable grounds to believe that the person to be arrested has committed or is committing such violation. The statute does not define "reasonable grounds" to believe that a violation has been or is being committed. That question must be determined in each case depending upon the particular facts and circumstances. But it may be said in general language that "reasonable grounds" for such belief exist when the facts and circumstances, together with the reasonable inferences fairly to be drawn from them, are such as would lead a reasonably intelligent, discreet, and prudent person to conclude that there is good ground to believe that the law relating to narcotic drugs has been or is being violated. Compare, Bruner v. United States, 150 F.(2d) 865; McIntire v. United States, 217 F.(2d) 663, certiorari denied, 348 U.S. 953; United States v. McCall, 243 F.(2d) 858. And it is not essential that the agent have before him legal evidence of the suspected violation. It suffices if the apparent facts coming to his attention are sufficient to lead a reasonably discreet, cautious, and prudent man to believe in good faith
51 that the illegal act has occurred or is occurring. Husty v. United States, 282 U.S. 694; United States v. Sebo, 101 F.(2d) 889; United States v. Heitner, 149 F.(2d) 105, certiorari denied, 326 U.S. 727; United States v. Li Fat Tong, 152 F.(2d) 650.

Information coming to an agent of the Bureau of Narcotics from an anonymous, undisclosed, or unverified

source, standing alone and without more, is not enough to furnish such agent reasonable grounds to believe that a person has committed or is committing a violation of the Narcotics Act, and therefore may be arrested and searched without authorizing process. Worthington v. United States, 166 F.(2d) 557; Contee v. United States, 215 F.(2d) 324; Wrightson v. United States, 222 F.(2d) 556. But the arrest, search, and seizure in this case were predicated upon more than information coming from an anonymous or undisclosed source. It came from a special employee of the Bureau of Narcotics. He had furnished information on previous occasions and it had unfailingly proved to be reliable and trustworthy. The information given on this occasion went into details. The informer gave the address of appellant; described him in respect to race, complexion, age, weight, dress, walk, and bag carried.
52 In addition, the informer gave the time of appellant's departure from Denver, his destination, the time of his return, and his mode of travel. And the information thus furnished the agent of the Bureau was verified by the officers as far as it could be done by observation after appellant alighted from the train. He alighted from a train inbound from Chicago. He arrived at the time specified in the information. The officers observed his race, complexion, height, weight, walk, dress, and kind of bag carried. And in respect to each and all of these details, the information furnished by the special employee was verified. The information furnished, together with the verification thereof after appellant alighted from the train, was sufficient to give the agent reasonable grounds to believe that appellant was committing a violation of the Narcotics Act. King v. United States, 1 F.(2d) 931; Coupe v. United States, 113 F.(2d) 145, certiorari denied, 310 U.S. 651; United States v. Li Fat Tong, supra; United States v. Bianco, 189 F.(2d) 716; United States v. Walker, (CA-7), — F.(2d) —. And therefore the arrest was authorized by section 104, supra.

The Fourth Amendment to the Constitution of the United States protects a citizen against unreasonable
53 searches and seizures without a search warrant. But the provision does not prohibit all searches and seizures without a search warrant. It denounces only those

which are unreasonable. But it does not undertake to define unreasonable searches and seizures. And their is no fixed formula for determining in every case whether a search and seizure was unreasonable. The frequently recurring question must be determined by reference to the particular facts and circumstances. United States v. Rabinowitz, 339 U.S. 56.

An arrest may not be used as a pretext to search for evidence of a crime. United States v. Lefkowitz, 285 U.S. 452. But when one is lawfully arrested, a search of his person without a search warrant is not forbidden by the Fourth Amendment; and anything found upon his person which is unlawful for him to have in his possession may be seized and used as incriminating evidence against him. Weeks v. United States, 232 U.S. 383; Carroll v. United States, 267 U.S. 132; Agnello v. United States, 269 U.S. 20; United States v. Di Re, 332 U.S. 581; United States v. Rabinowitz, supra.

Since the arrest was authorized by section 104, supra, and since the search and seizure incident to the arrest was not an unreasonable one, within the purview of the
54 Fourth Amendment, it follows that the motion to suppress was not well founded and that the incriminating evidence obtained by means of the search and seizure was properly admitted upon the trial of the case. Accordingly, the judgment is AFFIRMED.

HUXMAN, *Circuit Judge*, Dissenting.

The sole question in this case is whether the arrest and subsequent search of Draper without a warrant violated the Fourth Amendment to the United States Constitution which provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

At the outset it might be well to review some of the fundamental principles of law ingrained in English Jurisprudence in which must be found the answer to our

question. It may be trite to again say that the right of citizens to be secure in their homes and persons against unreasonable searches and seizures is a most
55 valuable right and heritage of American citizenship and that it must be guarded zealously and unrelentingly and that the courts must never permit it to be gradually whittled away under the guise of expediency or necessity. This was pointed out by Justice Sutherland in Byars v. United States, 273 U.S. 28, where he said, ". . . the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods. Constitutional provisions for the security of person and property are to be liberally construed, and 'it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'" No higher authority can be found than this pronouncement, and there are no subsequent decisions by the Supreme Court lowering the high standard set thereby.

There can be no question that absent extraordinary circumstances an arrest or search without a warrant constitutes a violation of the Fourth Amendment. In United States v. Vleck, 17 F. Supp. 110, the Court said, "Generally speaking, a search warrant is required for a lawful search and seizure . . . but the right to search without the warrant is the exception and not the rule." And in
56 McDonald v. United States, 335 U.S. 451, the Supreme Court said, "A search without a warrant is not justified unless the exigencies of the situation make the course imperative." What is true with regard to a search without a warrant is likewise true with respect to an arrest without a warrant.

Always, there must be present probable cause to believe that a crime has been committed, or is being committed, before one may obtain an arrest warrant or a search warrant, or to make an arrest or search without a warrant if such extraordinary circumstances are present which will support action without a warrant. Here the difficulty comes, as always, in determining what constitutes probable cause. Obviously no hard and fast rule can be

laid down. Whether there is probable cause is a legal conclusion to be drawn from a consideration of the facts.[1]

To define probable cause is not difficult. A good definition is found in Brinegar v. United States, 338 U.S. 160, where the Supreme Court defined probable cause in these terms, "'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of
57 guilt.' McCarthy v. De Armit, 99 Pa. St. 63, 69. . . . And this 'means less than evidence which would justify condemnation' or conviction. . . . Since Marshall's time . . . it has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within their [the officers] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." In United States v. McCall, 243 F.2d 858, we said, "But it may be said in general terms that probable cause exists where the facts and circumstances, together with reasonable inferences fairly to be drawn from them, are such as would lead a reasonably intelligent and prudent person to conclude that there is good ground to believe that the law is being violated."

The Narcotic Agent testified that he acted solely upon the tip he received from his informer, whom he had used previously and had always found reliable. He did not know Draper, in fact, he did not know that such a person existed until he received the tip from his informer. When asked, "In other words, if it wasn't for this information there would be absolutely no facts that you per-
58 sonally knew that would give grounds for probable cause to arrest this man, all the facts you have were gained from this information? Is that not right?" Marsh answered simply, "That's right. That is where the information came from."

Whether hearsay evidence in the form of a tip from an informer is alone sufficient to constitute probable cause as grounds for a warrant, or arrest and search without warrant, has never been squarely passed upon by any court. At least no case so holding has come to light. There

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[1] Mason v. Rollins, 2 Biss. 99, 16 Fed., Cases No. 9252, p. 1061.

is dicta in a number of cases touching the question, most of which is to the effect that an informer's tip alone is insufficient to constitute probable cause for action.

In Brinegar v. United States, 338 U.S. 160, the Court said, ". . . Probable cause exists where '*the facts and circumstances' within their* [the officers] *knowledge*[1] and of which they had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution a belief that 'an offense had been or is being committed.'" In United States v. Bianco, 189 F.2d 716, where evidence had been suppressed by the Trial Court,
59 the Appellate Court said, "If this hearsay alone supported the arrest, we would not disturb the conclusion of the district court." And in Wisniewski v. United States, 47 F.2d 825, where there was a tip and also other evidence the Court found reasonable cause, although "The previous information [from the informer] may have amounted to no more than ground for suspicion. . . ." In United States v. Turner, 126 F. Supp. 349, the Court said, "In my opinion the proper rule to be deduced from many, if not most, of the well considered cases upon the subject is that, while hearsay information only is not of itself sufficient to justify the search of a moving vehicle without a search warrant, reliable information . . ." is sufficient.

An illuminating case is United States v. Clark, 29 F. Supp. 138. The facts prompting the arrest were these, (1) Clark had entered and left a certain grocery store where the agents knew narcotics were sold; (2) she (Clark) was known to be an addict; (3) a reliable informer signaled by prearranged code that she had narcotics on her person as she came out. Facts (1) and (2) were given no credence by the Court. Therefore, the question fairly presented was whether the tip from a reliable informer was sufficient to constitute probable cause. The
60 Court answered in the negative saying, "It seems to us that the Fourth Amendment to the Constitution . . . is whittled away to nothingness if it is held that a citizen may be arrested and searched without a warrant of arrest or a search warrant if only it is shown that some reliable informer has said that the citizen has committed

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[1] Emphasis supplied.

or is committing a felony, without any showing whatever (and there was none here) that the informer's information was itself more than mere guess-work and speculation."

In Johnson v. United States, 333 U.S. 10, an informer tipped off officers that unnamed persons were smoking opium in a hotel room. He surmised this from the odor emanating therefrom. The officers rushed to the room, and clearly detected the odor. Johnson opened the door at their demand and they placed her under arrest. They searched the room and found opium. Johnson alone was present. The Court indicates its disapproval of tips alone constituting probable cause either for search or arrest when it says, "Thus the Government quite properly stakes the right to arrest, not on the informer's tip and the smell the officers recognized before entry, but on the knowledge that she was alone in the room, gained only after, and wholly by reason of, their entry of her home." The Court
61 held the action of the officers was illegal and not based on probable cause.

Two cases are sometimes cited as indicating a contrary conclusion.[1] The King case is not helpful. It does not reveal that the officers acted on an informer's tip. It merely states that the officers had "reliable and positive information." It does not reveal the character of this information. The opinion in the Li Fat Tong case contains a statement that "There is no reason to suppose that hearsay evidence derived from an informer is not as competent evidence on which to show probable cause for an arrest, . . ." as any other proof, but that statement was not necessary to the decision of the case. Standing alone this might indicate that such a tip alone was sufficient to constitute probable cause. But the statement was not the basis of the opinion. An examination of the opinion clearly reveals that there were surrounding facts and circumstances observed by the officers after they had received the tip which, considered together with the tip, constituted probable cause.

Coming then to the facts of this case, the officer who made the arrest had never heard of Draper and knew

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[1] King v. United States, 1 F.2d 931, and United States v. Li Fat Tong, 152 F.2d 650.

62 absolutely nothing of his case history or reputation as a law violator, if he had one. He acted solely on the tip from an informer whom he had used before and had found reliable. The information on which he acted was that Draper had gone to Chicago by train; that he was going to bring back approximately three ounces of heroin; that he would return by train either on the morning of the 8th or 9th. That is absolutely all the information the officer had as to the prospective commission of an offense. True, the informer described Draper as to height, weight, age, how he would be dressed, that he would be carrying a zipper bag and that he habitually walked fast.

Let us suppose that with the informer's tip in hand the officer had applied to a Magistrate for an arrest warrant for Draper. He would have been laughed out of court. The Court would quite correctly state, "Why you are unable to even say that you have information leading a reasonably prudent person to conclude that an offense has been or is now being committed. All you have is a prediction of things to come. Giving the tip on which you are acting the broadest scope possible it merely indicates that a crime will perhaps be committed on either the 8th or 9th. When you have more definite
63 information that an offense has been or is being committed, come back." Then let us suppose, on the 9th, when the arresting officer saw Draper get off the train and recognized him from the description he had received, he asked the assisting policeman to keep him under observation and he hurried back to the Magistrate for the warrants, and then stated, "I now have additional information tending to corroborate the tip that an offense would be committed sufficient to lead a reasonably prudent person to believe that Draper is now committing the offense and has brought narcotics into the state" and asked for a warrant. The Magistrate then asks, "What is this additional information?" To which the officer replies, "I saw Draper get off the train coming from Chicago." The Magistrate then asks, "Did Draper go to Chicago?" To which the officer answered, "I think so, because he got off of a train that came through Chicago." The Magistrate then asks, "Was there anything suspicious about his conduct from which one might conclude that he had narcotics

in his possession?" To which the officer replies, "Well no, but he was dressed as my informer said he would be dressed, he carried a zipper bag, and walked fast as the informer stated he usually walked." That is absolutely all the additional facts and circumstances
64 the officer acquired subsequent to the original tip from which we must conclude that a reasonably prudent man might be warranted in drawing the conclusion that Draper, in fact, was violating the law at the time he stepped from the train. It is from these facts and these facts alone that a reasonably prudent person must conclude that the prediction of things to come has now come about.

As I view the case, the arrest and search must stand on the uncorroborated tip from the informer that an offense would be committed on the 8th or 9th of September, and without support of a scintilla of other evidence remotely sufficient to warrant the conclusion that Draper had committed the offense and had narcotics in his possession when he left that train. The additional facts the officers observed at the station, which my associates say corroborate the tip that an offense would be committed, and which would now warrant the officer in believing that an offense was, in fact, being committed were in their possession from the beginning. The only function of these additional facts was to enable them to identify Draper. They were intended to serve no other purpose and were intended to establish nothing other than his identity.

I fail to see how facts communicated by an
65 informer solely for the purpose of identification can, when they are found to be true, without more evidence be said to constitute reasonable cause for believing that an offense was then being committed.

In United States v. Vleck, 17 F. Supp. 110, the Court cautioned that, "When undisputed evidence of guilt is obtained as a result of an unlawful search and seizure, there is the constant tendency of courts and law enforcement officers to search out some way of circumventing the constitutional guaranties. . . ." We must never permit a relaxation or whittling away of our constitutional rights under the pretext of expediency or necessity. Surely we are not so weak and impotent that we are unable to enforce all laws, giving strict adherence to constitutional pro-

visions and rights guaranteed to the individual thereunder. For these reasons I am forced to respectfully disagree with my associates. I would reverse and remand with directions to suppress the questioned evidence.

---

66 IN THE UNITED STATES COURT OF APPEALS

Judgment—September 12, 1957

Before Honorable Sam G. Bratton, Chief Judge, and Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

Clerk's Note Re Rehearing

(By order of September 23, 1957, the time for appellant's petition for rehearing was extended to October 5, 1957.)

---

67 IN THE UNITED STATES COURT OF APPEALS

Petition for Rehearing

Appellant respectfully petitions the Court for a rehearing of the within appeal, and as grounds therefor shows the following:

1. That the issue herein presents an important constitutional question relating to the administration of the criminal law in the Federal Courts.

2. That the issue herein has never been decided by a Court of Appeals or the United States Supreme Court, other than herein.

3. That the appellant contemplates filing a petition for a writ of certiorari with the United States Supreme Court on the issue raised herein, if said appellant can secure legal counsel to present said petition for certiorari and if this petition for rehearing is denied.

WHEREFORE, appellant respectfully prays that this Court en banc reconsider its majority opinion on this appeal, with or without reargument or additional written briefs, and withdraw the majority opinion and make the dissenting opinion the judgment of the Court.

Respectfully submitted,

JOHN J. ALTHOFF
Attorney for Appellant
Kinney Building
Greeley, Colorado

John J. Althoff, attorney for appellant, hereby certifies that in his opinion the above petition for rehearing is well-founded and is not interposed for purposes of delay.

JOHN J. ALTHOFF

---

68 IN THE UNITED STATES COURT OF APPEALS

Order Denying Petition for Rehearing—October 23, 1957

Before Honorable Sam G. Bratton, Chief Judge, and Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

Clerk's Note Re Mandate

(On October 29, 1957, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.)

69 (Clerk's Certificate omitted in printing)

70 SUPREME COURT OF THE UNITED STATES

(Title omitted)

Order Extending Time to File Petition for Writ of Certiorari—November 14, 1957

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 20th, 1957.

CHARLES E. WHITTAKER
Associate Justice of the Supreme Court of the United States.

Dated this 14th day of November, 1957.

---

71 SUPREME COURT OF THE UNITED STATES

(Title omitted)

Order Granting Certiorari and Motion for Leave to Proceed in Forma Pauperis—June 30, 1958

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the Tenth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1103 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 30, 1958

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Supreme Court of the United States

October Term, 1958

No. 136

JAMES ALONZO DRAPER,

Petitioner,

vs.

UNITED STATES OF AMERICA

BRIEF FOR PETITIONER

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Supreme Court of the United States

October Term, 1958

No. 136

JAMES ALONZO DRAPER,

Petitioner,

vs.

UNITED STATES OF AMERICA

BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court denying petitioner's motion to suppress is reported at 147 F. Supp. 689; the opinion of the Court of Appeals at 248 F. 2d 295.

Jurisdiction

The judgment of the Court of Appeals was entered on September 12, 1957 (R. 36). Timely application for rehearing was denied October 23, 1957 (R. 37). Mr. Justice Whittaker on November 14, 1957 granted an extension to December 20, 1957 within which to file a petition for certiorari (R. 38). The petition for certiorari was filed on December 16, 1957 and was granted on June 30, 1958 (R. 38). Jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254.

Constitution and Statutes Involved

The Fourth Amendment to the Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The statute under which the arrest of petitioner is sought to be justified reads as follows:

> Section 7607(2), Title 26, United States Code:
> [Agents of the Bureau of Narcotics may]
>
> "(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

The statute under which petitioner was convicted reads:

> Section 174, Title 21, United States Code:
>
> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal

Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Questions Presented

1. Is an arrest without warrant valid when the arresting officer's only information with regard to violation of law was hearsay?

2. Is an arrest without warrant valid when the arresting officer's only information with regard to violation of law came from an informer and the facts upon which he based his information were not disclosed either to the officer or before the court?

3. Is an arrest without warrant valid when the arresting officer had no information that a law had actually been violated?

4. Did the courts below err in denying petitioner's motion to suppress the evidence taken from him at the time of his arrest?

5. Did the court below err in affirming petitioner's conviction?

Statement

Petitioner was indicted for fraudulent receipt, transportation and concealment of heroin illegally imported into the United States, with knowledge of such unlawful importation (R. 1). Prior to trial he moved to suppress evi-

dence seized from him at the time of his arrest (R. 1, 2). That motion was denied (R. 21) and the seized material was received at the trial (R. 27). Petitioner was convicted and sentenced to imprisonment for 10 years (R. 22). He is now serving that sentence.

At the hearing on the motion to suppress only the arresting agent, one Marsh, testified with regard to probable cause (R. 7-11). He had had no prior knowledge of petitioner whatever (R. 11). The arrest was occasioned by information received by one Hereford, described as a "special employee" of the Bureau of Narcotics (R. 8). This meant that, from time to time, Hereford furnished information for which he was paid small sums of money (R. 10). Marsh testified that the information previously given by Hereford had always been reliable (R. 10). Hereford had died before the hearing (R. 8).

Marsh testified that on September 3, 1956, Hereford told him that petitioner lived at a certain address in Denver and was peddling heroin (R. 8). Nothing appears to have been done by the agents after receipt of that information. Then, on September 7, Hereford told the witness that petitioner had gone to Chicago to bring back heroin and would return either the next day or the day after (R. 8). Hereford described petitioner's appearance and clothing to Marsh, and stated that he was carrying a light tan zipper bag and habitually walked very fast (R. 8, 9). It is significant that Marsh gave no testimony in respect to the basis for Hereford's conclusion that petitioner was a narcotics peddler or his belief that petitioner was going to bring heroin back from Chicago. Nor did Marsh receive any information that petitioner had actually acquired any heroin or that what he did acquire had been illegally imported or that he knew this.

Marsh, acting on the information he received, then watched incoming trains on both days referred to by Hereford and, on the second day, noticed a man answering the

description given him (R. 9). Marsh and another officer then physically apprehended petitioner, removed a billfold from his pocket and so discovered his name and then placed him under arrest (R. 9, 11). Petitioner's hand was removed from his pocket and bags found in his fist which contained heroin (R. 12). The zipper bag contained a syringe (R. 10, 13). These are the articles with which the motion was concerned (R. 2). They were put in evidence at the trial (R. 26, 27).

Marsh testified that he had known nothing about petitioner except what he had learned from Hereford:

> "Q. In other words, if it wasn't for this informer, there would be absolutely no facts that you personally knew that would give grounds for probable cause to arrest this man, all the facts you have were gained from his informer, is that not right? A. That's right. That is where the information came from" (R. 11).

Summary of Argument

An arrest without warrant is not justified when the arresting officer has no knowledge of the facts supporting an inference of probable cause and acts entirely upon hearsay. Especially is this the case when the hearsay consists solely of a conclusion stated by an informer without any particulars having been disclosed to the arresting officer, or even, later, to the court.

Here, moreover, the only information given to the arresting officer was that petitioner intended to commit a crime. The informer had no knowledge that a crime had in fact been committed and did not purport to advise the officer that it had.

Under such circumstances the motion to suppress the material taken at the time of arrest should have been granted and the evidence rejected at the trial. Consequently petitioner's conviction should be reversed.

POINT I

Arrests without warrant are justified only if there is probable cause that a crime has been committed.

This Court has repeatedly pointed out that arrests and searches without warrant are the exception. Whenever feasible it has required officers to obtain warrants and has reversed convictions when this had not been done: *Johnson* v. *United States*, 333 U. S. 10; *Jones* v. *United States*, 357 U. S. 493.

As Mr. Justice Jackson said in *Johnson* (at p. 13):

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers."

An arrest without warrant may not rest on suspicion, but only on "probable cause" (*Brinegar* v. *United States*, 338 U. S. 160) or, as the statute here relied on by the government provides (26 U. S. C. § 7607-2) on "reasonable grounds". We submit these criteria are identical—otherwise the statute itself would be in violation of the Fourth Amendment.

Here, as we shall show, no probable cause existed.

POINT II

No facts were known to the arresting officer which justified an arrest.

This Court has indicated that less may be needed to justify the issuance of a warrant than to sustain an arrest without warrant (*Johnson* v. *United States, supra,* at 13). But it is clear that an arrest without warrant is not justified when the facts are not sufficient to authorize the issuance of a warrant: *United States* v. *Di Re,* 332 U. S. 581, 587; *United States* v. *Lefkowitz,* 285 U. S. 452, 464; *Brown* v. *United States,* 4 F. 2d 246 (9th Circuit); *Wakkuri* v. *United States,* 67 F. 2d 844 (6th Circuit); *Worthington* v. *United States,* 166 F. 2d 557 (6th Circuit); *Wrightson* v. *United States,* 222 F. 2d 556 (D. C. Circuit); *United States* v. *Castle,* 138 F. Supp. 436 (D. C. D. C.).

It can hardly be doubted that the facts known to Marsh were not sufficient to justify his obtaining a warrant of arrest. The only information he had came from an informer who, so far as here appears, did not disclose the source of his information, nor even indicate that a crime had in fact been committed, only that one was going to be committed.

This is not sufficient on any one of the following grounds: An arrest may not be made only on hearsay information; an arrest may not be made when the informant does not disclose the basis for his conclusion or where the information merely is that a crime is being planned.

1. Whether hearsay alone can support an arrest without warrant has never been passed upon by this Court, although in *Scher* v. *United States,* 305 U. S. 251, 254, the Court was careful to note that the search there did not depend on hearsay. A search was held void in *United States* v. *Turner,* 126 F. Supp. 349 (D. Md.) because it rested only on hearsay.

This Court's comment on the use of hearsay in *Brinegar* v. *United States, supra,* at 174, n. 13, related only to the use of hearsay to support a warrant. That is vastly different from the use of hearsay to justify an arrest without a warrant. In the one case, before an arrest can be made, the decision as to the sufficiency and reliability of the information is passed upon by a judicial officer; in the other, only by the arresting agent. What has already been quoted from *Johnson,* supports this view.

2. We can here, however, rest on the proposition that if hearsay is relied on the basis for the hearsay must be disclosed, and that it is necessary that the hearsay indicate the actual commission of a crime. This proposition is supported by the following cases.

In *United States* v. *Bianco,* 189 F. 2d 716 (3d Circuit), the agent who made the arrest received information from another agent who had personal knowledge of the facts that indicated that a crime had been committed. The court held that the government was entitled to rely on this knowledge but that it must be scrutinized. Otherwise, in effect, the arresting agent could pull himself up by his bootstraps. The decision of the District Court there, 94 F. Supp. 239, was reversed only because the facts observed by the second agent and testified to by him at the hearing were sufficient. Cf. *United States* v. *Gowen,* 40 F. 2d 593 (2d Circuit), where an arrest was upheld because the informer had given particulars showing the commission of an offense. (The holding that the search was reasonable was reversed, *sub nom. Go-Bart Importing Co.* v. *United States,* 282 U. S. 344.)

In *United States* v. *Clark,* 29 F. Supp. 138 (W. D. Mo.), the court granted a motion to suppress where the only evidence was that the arresting agent had seen defendant leave a store where it was known narcotics were sold and enter a car in which a reliable (and identified) informer was seated, who signaled that defendant was in possession

of narcotics. But it did not appear how the informer knew this. Judge Otis said at page 140:

> "It seems to us that the Fourth Amendment to the Constitution, U. S. C. A., is whittled away to nothingness if it is held that a citizen may be arrested and searched without a warrant of arrest or a search warrant if only it is shown that some reliable informer has said the citizen has committed or is committing a felony, without any showing whatever (and there was none here) that the informer's information was itself more than mere guess-work and speculation."

Many cases have announced the principle that reliance on information from an informer is not enough. While stress is laid in some of the opinions on the fact that the identity of the informer was not disclosed, we suggest that the real basis for these decisions is that the basis for the informer's conclusion that a crime had been committed was not disclosed: *Brown* v. *United States, supra; Wisniewski* v. *United States,* 47 F. 2d 825 (6th Circuit); *Contee* v. *United States,* 215 F. 2d 324 (D. C. Circuit); *Wrightson* v. *United States, supra; United States* v. *Baldocci,* 42 F. 2d 567 (S. D. Cal.); *United States* v. *Blich,* 45 F. 2d 627 (D. Wy.); *United States* v. *Tom Yu,* 1 F. Supp. 357 (D. Ariz.); *United States* v. *Vleck,* 17 F. Supp. 110 (D. Nebr.); *United States* v. *Castle, supra.*

The *Tom Yu* case, *supra,* is particularly significant since there, as here, an essential element of the crime was illegal importation and the facts did not justify any inference to that effect. In *Grau* v. *United States,* 287 U. S. 124, this Court held a search warrant bad because the affidavit on which it was based did not indicate that a dwelling was used for the sale of liquor, Congress having limited search warrants of dwellings to such cases. Cf. *United States* v. *Office No. 508 Recou-Brewster Bldg.,* 119 F. Supp. 24 (N. D. La.), where a search warrant was quashed because the affidavit said nothing about the non-payment of the gambling tax which was essential to the offense.

Pertinent in this connection is the recent case of *Giordenella* v. *United States*, 357 U. S. 480. There the Court voided an arrest made on a sworn complaint because it contained only conclusions, not facts. The case at bar is even stronger. In *Giordenella* the complaint charged that a crime had in fact been committed on a certain day, whereas here all the informer was able to advise the arresting officer was that the suspect "was going to bring back" heroin in the future (R. 8).

Indeed, the majority in the court below appear to have recognized the infirmity of reliance on the informer's tip alone. For Chief Judge Bratton said:

> "Information coming to an agent of the Bureau of Narcotics from an anonymous, undisclosed, or unverified source, standing alone and without more, is not enough to furnish such agent reasonable grounds to believe that a person has committed or is committing a violation of the Narcotics Act, and therefore may be arrested and searched without authorizing process. * * *" (248 F. 2d at 298).

But in finding support for their conclusion the majority referred to "details" given by the informer and to "verification" of them by the arresting agent. However, these "details" related only to the identification of petitioner, not to his involvement in crime. (No testimony whatever was given at the hearing with regard to the informer's basis for his tip in this respect.) The "verification" rose no higher than the information. As was held in *Clark*, *supra*, that is not enough.

Moreover, as Judge Huxman, dissenting below, so graphically stated (248 F. 2d at 302), the arresting agent had no information whatever that any crime had actually been committed. He had merely been told that petitioner was going to Chicago to acquire heroin, not that he had actually acquired it. No attempt appears to have been made to have petitioner followed either in Denver after September 3rd, when Marsh first heard of him (R. 16, 17),

or in Chicago on September 7th, when Marsh was told he was there (R. 17).

Moreover, Marsh, the arresting agent, had no notion whatever at the time of arrest whether petitioner had been able to accomplish his objective. For all that Marsh knew, or had been told, petitioner was returning empty-handed when arrested. That is an arrest on suspicion alone and cannot be sustained.

The court below is not supported by the cases it cited (248 F. 2d at 299), since in each of them some facts were observed by the arresting officers which justified an inference of criminal activity.

In *King* v. *United States*, 1 F. 2d 931 (9th Circuit), the agents observed a car traveling with curtains drawn in the early morning hours. In *Coupe* v. *United States*, 113 F. 2d 145 (D. C. Circuit), cert. den. 310 U. S. 651, the officers saw defendant put a bag in his car containing pads which were of the kind used in lottery transactions. In *United States* v. *Li Fat Tong*, 152 F. 2d 650 (2d Circuit), defendant dropped a bottle from which the odor of narcotics emanated as it broke. In *United States* v. *Bianco, supra* (3rd Circuit), one of the agents testified to personal observation of defendant at a place where lottery tickets were sold in company with distributors and that defendant was given a large suitcase. As to *United States* v. *Walker*, 246 F. 2d 519 (7th Circuit), the search was justified because a moving automobile was involved. Moreover, in each of those cases the information received was to the effect that a crime had already been committed, not, as here, that it was only planned.

To the extent that any of these cases may not be distinguishable, we suggest, however, that they are not sound and should not be approved by this Court.

Conclusion

The holding below conflicts with the principles laid down by this Court in *Grau, Johnson* and *Giordenella, supra,* and by the Courts of Appeals for the Second, Third, Sixth, Ninth and District of Columbia Circuits in *Gowen, Bianco, Wisniewski, Brown* and *Contee,* respectively, *supra.*

Accordingly, the judgment of affirmance should be reversed.

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Supreme Court of the United States

October Term, 1958

No. 136

JAMES ALONZO DRAPER,

Petitioner,

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UNITED STATES OF AMERICA.

REPLY BRIEF FOR PETITIONER

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JOHN J. ALTHOFF,
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Supreme Court of the United States

October Term, 1958

No. 136

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UNITED STATES OF AMERICA.

REPLY BRIEF FOR PETITIONER

1. The government devotes the greater part of its brief to the proposition that an informer's statements may be considered in determining whether an arrest without warrant is justified (pp. 10-28). As we pointed out in our main brief (p. 8), petitioner's case does not require a decision on that subject.

The government's chief reliance is on *Brinegar* v. *United States,* 338 U. S. 160. But that case dealt with a moving automobile and involved observation by the arresting officers of matters which justified an inference that the car was engaged in an illicit enterprise. No question of statements by an informer was involved. We do not see how the decision in that case is relevant here. Mr. Justice Rutledge's discussion of probable cause quoted by the government (pp. 11, 12) occurred in relation to matters known to the officers not competent at a trial on the merits, but not at all to hearsay. We believe that the controlling consideration is to be found in the following statement with reference to moving automobiles (not quoted by the government):

> " * * * In such a case the citizen who has given no good cause for believing he is engaged in that

> sort of activity is entitled to proceed on his way without interference. But one who recently and repeatedly has given substantial ground for believing that he is engaging in the forbidden transportation in the area of his usual operations has no such immunity, if the officer who intercepts him in that region knows that fact at the time he makes the interception and the circumstances under which it is made are not such as to indicate the suspect is going about legitimate affairs." (338 U. S. at 177)

We do not see how the government can derive any benefit from *Costello* v. *United States*, 350 U. S. 359, or *Nowak* v. *United States*, 356 U. S. 660 (cited p. 17). In the first of these this Court was motivated by fear that an inquiry into the nature of the evidence heard by a grand jury would result in great delay (350 U. S. at 863); in the second case the function of the affidavit was merely to inform a defendant of the basis of the denaturalization proceeding.

It may be that exceptional circumstances might justify reliance on hearsay—as when an officer is requested to make an arrest by an eye witness to a serious crime. But surely this is not such a case.

2. In discussing the facts of this case the government (brief, pp.28-37) places great reliance on the supposed "corroborating facts." But, as we have already noted (main brief, p. 10), none of these facts bore on the commission of a crime. Certainly the fact that a man returns from a distant city on the second of two indicated dates proves nothing—nor does the fact that he corresponds to the description given. These facts establish that the informer knew defendant and had some information about his movements. But there was no testimony that the informer had told the officer that he had been with defendant in Chicago and had seen him buy narcotics—nor even any testimony as to whether the officer had ever inquired from the informer on what he based his conclusions.

The government, while conceding the absence of such testimony (brief, p. 10, note 2; p. 32), seems to suggest that petitioner should have inquired on the subject at the hearing. We submit that petitioner was under no such obligation. Once it was conceded that the arrest was without warrant the burden was on the government to justify. Its agents were in possession of the facts, petitioner was not.

But the government takes the position (brief, pp. 7, 31, 33) that the fact of petitioner's return from Chicago justifies an inference by the arresting officer not only that he had gone there for an illicit purpose (which is all that the informer had ever told the officer), but also that this objective had been accomplished! We submit that neither inference is permissible. Moreover, as we have already pointed out (main brief, pp. 10, 11), the informer did not tell the officer that the crime of transportation had been committed; only that petitioner "was going to bring back" some heroin (R. 8). Indeed, there is nothing in this record to suggest that the informer had even told the officer that petitioner had actually bought any heroin.

We are asked to infer from the "corroborating" fact of return from Chicago that heroin had in fact been purchased, that it had been illegally imported into the United States, and that petitioner had knowledge of such unlawful importation—for that is the charge here (R. 1). We submit there is no logical basis for any of these inferences.

The government (brief, p. 34) cites two cases not referred to in the court below: *Browner* v. *United States*, 215 F. 2d 753, and *United States* v. *Jackson*, 149 F. Supp. 937. We do not believe that either of those cases was correctly decided, although the second may rest on the circumstance that a moving automobile was involved.

Finally the government (brief, pp. 36, 37) pleads for an extension of the moving vehicle cases to all narcotics

cases, on the ground that narcotics can be easily hidden—citing *United States* v. *Kansco,* 252 F. 2d 220. But in that case the officer did what was not done in the case at bar. After receiving information the officer checked the movements and activities of the suspect and in this way observed actions which justified the arrest—particularly the suspect's "agitation" when he noticed he was being observed. Those facts are altogether different from what might be described as the "shot gun" behavior of the officer in the case at bar.

We submit that none of the arguments advanced by the government justifies what occurred here.

Respectfully submitted,

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No. 136

In the Supreme Court of the United States

OCTOBER TERM, 1958

JAMES ALONZO DRAPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 136

JAMES ALONZO DRAPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 25–36) is reported at 248 F. 2d 295. The opinion of the district court (R. 16–21) denying petitioner's motion to suppress evidence is reported at 146 F. Supp. 689.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1957 (R. 36), and a petition for rehearing was denied on October 23, 1957 (R. 37). The petition for a writ of certiorari was filed on December 16, 1957, and granted on June 30, 1958 (R. 38; 357 U. S. 935). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether information from an informer previously found reliable, coupled with corroboration of such information, constituted probable cause to arrest petitioner.

STATUTE INVOLVED

26 U. S. C. (Supp. V) 7607, added by Section 104 (a) of the Narcotic Control Act of 1956, 70 Stat. 570, provides in pertinent part:

> The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401 (l) of the Tariff Act of 1930, as amended; 19 U. S. C. sec. 1401 (l)), may—
>
> * * * * *
>
> (2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation.

STATEMENT

On October 3, 1956, a one-count indictment was returned against petitioner in the United States District Court for the District of Colorado charging violation of the federal narcotics law (21 U. S. C. 174) (R. 1). Petitioner's pre-trial motion (R. 1–2) to suppress heroin and a hypodermic syringe found

on his person and in a traveling case that he was carrying when arrested was denied (R. 16–21). Following trial before the court without a jury, he was convicted as charged and sentenced to imprisonment for 10 years as a second offender (R. 21–22).

The pertinent evidence adduced at the pre-trial hearing, on October 26, 1956, pursuant to petitioner's motion to suppress, may be summarized as follows:

On about September 3, 1956, John W. Marsh, for 29 years a narcotics agent for the United States Treasury Department, received information from one James A. Hereford, a special employee of the Bureau of Narcotics, that petitioner whose address was given was "peddling heroin" to addicts in Denver (R. 8). Subsequently, on September 7, 1956, Agent Marsh received further information from Hereford that petitioner had gone to Chicago by train the day before and that he was going to return to Denver by train on the morning of the 8th or 9th of September with about 3 ounces of heroin. Hereford gave the agent explicit data concerning petitioner's race, age, height, and weight and said that petitioner habitually walked fast. He also gave the agent a detailed description of petitioner's attire and said that he would be carrying a tan leather zippen bag.[1] Hereford had been a special employee of the Bureau of Narcotics for 6 months prior to this time and had been paid small

[1] In detail, Hereford's description of petitioner was as follows: a Negro; light-brown complexion; wearing a light-colored nylon raincoat, brown slacks, black shoes, and a gray felt hat; carrying a tan leather zipper bag; about 27 years of age, 5′ 8″ in height, and 160 pounds in weight; habitually a fast walker (R. 8–9, 10–11, 12).

sums of money for the information given. Agent Marsh testified that he had personally investigated all information Hereford had furnished him in the past, and had always found it to be reliable (R. 10). Hereford's death a few days after petitioner's arrest (September 13, 1956) precluded any possibility of his testifying at the pre-trial hearing (R. 8).

On September 8, acting upon the information imparted by Hereford, Agent Marsh, with other federal narcotics agents and a member of the Denver Police Department, went to the Denver railroad station and met all the incoming Chicago trains. They spotted no one fitting the description given by Hereford (R. 9). On the following day, September 9, the railroad station was again placed under surveillance. At about 8:20 a. m., a person accurately fitting the description given by Hereford was seen alighting from an incoming Chicago train (R. 9, 12). Finding Hereford's description exact in every detail, Marsh arrested this individual who, according to the agent and Sergeant Seaton of the Denver police, identified himself as "Carl Francis" (R. 9, 12). His billfold was immediately examined, revealing his true identity to be James A. Draper (R. 9). He was then immediately searched. Two paper packages containing approximately 2 ounces of heroin were found in his left hand which he had kept tightly clenched in his raincoat pocket (R. 9–10, 12). The leather bag that he was carrying was also opened and found to contain a hypodermic syringe (R. 10, 13). Petitioner was then taken to the office of the Bureau of Narcotics, informed that he did not have to make a statement, and

warned that any statement he did make could be used against him (R. 10).

The district court denied petitioner's motion to suppress the heroin and syringe, finding that the search and seizure was incident to a lawful arrest made on probable cause (R. 16–21). Following petitioner's conviction, the court of appeals affirmed, one judge dissenting (R. 25–36).

SUMMARY OF ARGUMENT

The single question in this case is whether Agent Marsh, the arresting officer, had probable cause to believe that petitioner had committed a felony. The information relied upon by Marsh consisted of a report by an informer of proven reliability (Hereford) and corroborating facts personally observed by Marsh. If these facts supplied a reasonable basis for Marsh's belief in petitioner's guilt, the arrest was valid and the particular and limited search of petitioner's person and his carrying-case, incident to the arrest, was proper.

1. Petitioner broadly attacks the use of "hearsay"—*i. e.*, reports of informers—as a basis for a finding of probable cause. But a determination of probable cause does not require the same standards of proof as the ultimate determination of guilt, and the technical rules controlling the admissibility of evidence in a judicial trial have no application. As this Court observed in *Brinegar* v. *United States,* 338 U. S. 160, 173, "There is a large difference between the two things to be proved [guilt or probable cause], as well as between the tribunals which determine them, and therefore a like difference in the *quanta* and modes

of proof required to establish them." The exclusionary rules applicable to criminal trials thus have no relevance to issues of probable cause involving "probabilities" and the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act" (*id.* at 175). On that issue, the sole question is whether " 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed" (*id.* at 175–176). The test is whether the information, whatever its nature, is reliable and trustworthy, not whether it would be admissible in a judicial trial under the rules of evidence. See also *Costello* v. *United States,* 350 U. S. 359, upholding an indictment based solely on hearsay testimony before the grand jury.

It does not follow, of course, that a report by an informer of incriminating facts will always be sufficient to justify an arrest. In all cases, however, the inquiry goes only to the "weight" and "probative force" of the information and not to its "admissibility"; the problem is simply that of weighing the reliability of the information under all the facts and circumstances of the particular case. Knowledge of the informer's reliability in the past, of his access to the information reported, and of the existence of circumstances tending to corroborate his report are, for example, considerations that may be crucial in a particular case. In addition, the proof required may vary depending upon the circumstances of the pro-

posed arrest: for example, the necessity for immediate action, the place and time of the arrest, and the nature of the offense. It is, therefore, impossible to state in a rigid rule the weight to be accorded to the statements of an informer, and it is upon the totality of circumstances in each case that the determination of probable cause must ultimately rest.

2. The concurrent finding of both courts below that under all the facts and circumstances of this case Agent Marsh had reasonable cause to believe that petitioner was illegally possessed of narcotics at the time of his arrest was fully supported by the evidence.

Agent Marsh was told by Hereford, an informer whose reliability had been personally confirmed by Marsh on past occasions, that the petitioner, whom he reported had been peddling heroin, had gone to Chicago to obtain a supply of heroin and would return by train on the next or the following morning. By personal observation of petitioner's arrival on the Chicago train, Marsh confirmed that petitioner had in fact been to Chicago, had returned "on schedule," and was wearing exactly the clothes that Hereford had said he would. From this confirmation that Hereford accurately knew that petitioner had gone to Chicago, knew when and how he would return, and even knew what he would be wearing—as well as from Hereford's proven reliability in the past—Marsh could reasonably infer that Hereford also knew, as he said he did, the purpose of petitioner's trip. And from the completion of the trip according to schedule, he could further infer that the trip had been successful and that petitioner was possessed of the narcotics he had

gone to Chicago to get. From the nature of the alleged offense, no further confirmation was possible.

At that point, Agent Marsh was faced with the alternative of immediately arresting petitioner, who was hurriedly leaving the station, or of risking the destruction, secretion, or distribution of the small (and readily disposable) packet of narcotics believed to be in his possession. In these circumstances, we submit that Agent Marsh's decision to arrest petitioner—during daylight, in a public place, and not requiring entry into petitioner's home or other private premises—was justified by the facts known to him and was a reasonable determination predicated upon the exigencies of the moment under a good faith belief in petitioner's probable guilt.

While Agent Marsh was entitled, under the statute, to arrest on probable cause without a warrant even if he had had time to obtain one (see *Trupiano* v. *United States*, 334 U. S. 699, 705), it is also clear from the circumstances indicated above that, by the time Marsh had sufficient information to constitute probable cause, immediate action was necessary to prevent probable disposition of the narcotics. Hence, the arrest without a warrant was entirely reasonable and made in good faith.

ARGUMENT

The single issue posited in this case is whether petitioner's arrest was valid. If it was, then the search of his person and his tan zipper bag, incidental to the arrest, was entirely proper. It is established that officers have the right "to search the person

of the accused when legally arrested to discover and sieze the fruits or evidences of crime. This right has been uniformly maintained in many cases." *Weeks* v. *United States,* 232 U. S. 383, 392; *Carroll* v. *United States,* 267 U. S. 132, 158; *Agnello* v. *United States,* 269 U. S. 20, 30.

The validity of the arrest in this case, just as in the case of an arrest with a warrant, pivots solely on the question of whether there was probable cause. Historical evidence, decisions of this Court, and in this case the plain Congressional directive (Narcotic Control Act of 1956, 70 Stat. 567, 570, *supra,* p. 2) emphasize that no additional justification need be shown to arrest for a felony without a warrant than need be shown to obtain a warrant. In either case the requirement is probable cause. See *Trupiano* v. *United States,* 334 U. S. 699, 705. The impracticability of obtaining a warrant or the existence of exceptional circumstances mandating immediate arrest attain significance in the non-warrant procedure only as these factors help to indicate whether the officers were proceeding in good faith, or aid in spelling out probable cause. The basic issue in each case, however, is whether the information which the officers had was sufficient to warrant the belief that the person arrested had committed a felony. We think there was probable cause for the arrest here and that in all the circumstances—the information received from a reliable informant plus the corroboration of that information by observation—the officers were justified in making the arrest. As we develop below, the issue is not whether some part of the information which the officers had is technically hear-

say; the issue is whether in totality that information constituted probable cause.

I

STATEMENTS OF AN INFORMER MAY PROPERLY BE CONSIDERED IN DETERMINING WHETHER THERE IS PROBABLE CAUSE TO BELIEVE THAT A SUSPECT HAS COMMITTED A FELONY

Petitioner broadly attacks the use of "hearsay" evidence to support a conclusion that there is probable cause to arrest. We may pass the question whether the information relied upon here was technically "hearsay",[2] for in any event it is clear that hearsay may properly be utilized for that purpose. The issue is not the technical one of the admissibility of the evidence as final proof of guilt but the eminently practical and non-technical one of whether the information possessed by the arresting officer, whatever its legal characterization, warrants a belief based upon reason that a felony has been committed and that the person sought to be arrested has committed it.

1. Just as the test of a reasonable search and seizure "cannot be stated in rigid and absolute terms" (*Harris*

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[2] If the information imparted by informer Hereford to Agent Marsh was based upon Hereford's personal knowledge and observation, it would not be hearsay in relation to Marsh's determination of probable cause. In the hearing on the motion to suppress, Marsh's testimony as to the assertions made to him by Hereford would be hearsay if used to establish the truth of those assertions, but it would not be hearsay if used only to prove that Marsh had probable cause to arrest. As noted below (pp. 32–34), however, the record is deficient on the extent to which Hereford had personal knowledge of the assertions made by him.

v. *United States,* 331 U. S. 145, 150), but "must find resolution in the facts and circumstances of each case" (*United States* v. *Rabinowitz,* 339 U. S. 56, 63), so the concept of probable cause is not amenable to precise definition and cannot provide in the abstract a clear-cut formula by which to measure the conduct of arresting officers. On the contrary, in the nature of things, probable cause requires in each case a proper balance between the requirements of effective law enforcement and the right of the individual to be left alone. Cf. *Johnson* v. *United States,* 333 U. S. 10. This Court in *Carroll* v. *United States,* 267 U. S. 132, 162, and most recently in *Brinegar* v. *United States,* 338 U. S. 160, 175–176, did not attempt any specific definition of probable cause, but laid down a broad general standard capable of embracing varying factual patterns:

> Probable cause exists where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.

See to like effect: *Stacey* v. *Emery,* 97 U. S. 642, 645; *Dumbra* v. *United States;* 268 U. S. 435, 441; *Husty* v. *United States,* 282 U. S. 694, 701.

Explaining in *Brinegar* that this standard seeks to "give fair leeway" for law enforcement while protecting "citizens from rash and unreasonable interferences with privacy" (338 U. S. at 176), the Court there accepted officer Malsed's testimony of Brinegar's

arrest and pending indictment on another charge
e issue of probable cause, although the same
ace would not have been admissible on the issue
it. The Court went on expressly to repudiate
rlier dictum of *Grau* v. *United States*, 287 U. S.
28, that facts constituting probable cause must
mpetent to convict. The Court, speaking through
Justice Rutledge, observed (338 U. S. at 176):

> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. * * *

reliability of the information was made the criti-
nquiry, not whether the information would be
ssible in an adversary proceeding.[3]

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hile the court in *Brinegar* was dealing with the pro-
of a search without a warrant, Mr. Justice Rutledge
ed the issue to be: "whether there was probable cause for
gar's *arrest*" (338 U. S. at 164; emphasis added). More-
the Court's discussion of *Grau* and other decisions relat-
o search warrants and arrest without warrant (338 U. S.
4–176; particularly fns. 13 and 15) emphasizes that the
standard of probable cause laid down by the Court ap-

Under the *Brinegar* rationale, reliable information, though not gleaned from direct observation and hence not admissible on the issue of guilt, may nonetheless lead "sensibly to * * * conclusions of probability." Under some circumstances such information may in and of itself suffice to establish probable cause. In others it may warrant such a finding where the second-hand information is coupled with personal investigation and corroboration by the investigating officer. At the far extreme, the information may be too questionable to warrant any substantial consideration. In all cases, however, the sole question is what weight should be attached to the information and it is not to be discarded solely on evidential grounds which derive their justification from the nature of an adversary proceeding and have no pertinency in resolving the practical problem of probable cause.

2. The development of the hearsay rule is directly traceable to, and has its justification only in relation to, an adversary system. Thus during the early 1500's when the conduct of the trial was completely out of the hands of the litigants and the practice was for the jury to contact non-participants and to rely upon information provided by such persons, no hearsay rule existed, nor was one necessary. Only as time

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plies generally to the warrant and non-warrant procedure, whether arrest or search. *Brinegar* has been so read by Courts of Appeals: *Washington* v. *United States*, 202 F. 2d 214, 215 (C. A. D. C.), certiorari denied, 345 U. S. 956 (search warrant); *Hawkins* v. *United States*, 238 F. 2d 265 (C. A. D. C.), (search and arrest warrants), certiorari denied, 353 U. S. 925 (see Govt's. Brief, No. 538 Misc., O. T. 1956); *Seawell* v. *United States*, 243 F. 2d 909, 911, 912 (C. A. 4) (arrest without warrant).

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progressed and the parties themselves were allowed to submit evidence and call witnesses, and such judicially received evidence became the sole basis for the jury's decision, was the nature and quality of the evidence critically examined. See, generally, 5 Wigmore, *Evidence* 9–27 (1940 ed.); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 Harv. L. Rev. 177, 179–183 (1948); Morgan, *Some Problems of Proof* 106–109 (1956). From the development of the adversary proceeding evolved the rule against hearsay. It derived from the philosophy that the party against whom evidence is sought to be introduced should have the opportunity to put such evidence to the test of cross-examinaion. See 5 Wigmore, *Evidence* 3, 29 (1940 ed.). But while exclusion of hearsay evidence in an adversary proceeding may be essential to the preservation of the opposing party's right of cross-examination, the need for such exclusion is not present in an *ex parte* determination (either by a Commissioner in issuing a warrant or by an officer in making an arrest) where no right of cross-examination exists in any event. In such a determination the sole question thus becomes the weight and reliability of the hearsay information.

For these reasons, as we have indicated, the conventional rules of evidence play no part on the issue of probable cause. As this Court drew the distinction in *Brinegar* (338 U. S. at 173, 174–175):

> There is a large difference between the two things to be proved [probable cause or guilt], as well as between the tribunals which determine them, and therefore a like difference in

> the *quanta* and modes of proof required to establish them.
>
> For a variety of reasons relating not only to probative value and trustworthiness, but also to possible prejudicial effect upon a trial jury and the absence of opportunity for cross-examination, the generally accepted rules of evidence throw many exclusionary protections about one who is charged with and standing trial for crime. * * *
>
> However, if those standards were to be made applicable in determining probable cause for an arrest * * *, few indeed would be the situations in which an officer, charged with protecting the public interest by enforcing the law, could take effective action toward that end. Those standards have been seldom so applied.
>
> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

Numerous decisions in the lower courts have either expressly or implicitly accepted the view that hearsay may be considered on the issue of probable cause. See, *e. g., Seymour* v. *United States,* 177 F. 2d 732 (C. A. D. C.); *Browner* v. *United States,* 215 F. 2d 753 (C. A. 6); *United States* v. *Walker,* 246 F. 2d 519 (C. A. 7); *Wrightson* v. *United States,* 236 F. 2d 672 (C. A. D. C.); *De Bruhl* v. *United States,* 199 F. 2d 175 (C. A. D. C.), certiorari denied, 344 U. S. 868; *Weise* v. *United States,* 251 F. 2d 867 (C. A. 9), cer-

tiorari denied, 357 U. S. 936; *United States* v. *Kancso*, 252 F. 2d 220 (C. A. 2); *Mills* v. *United States*, 196 F. 2d 600 (C. A. D. C.), certiorari denied, 344 U. S. 826; *United States* v. *Fowler*, 136 F. Supp. 926 (E. D. Tenn.), affirmed 229 F. 2d 215 (C. A. 6); *United States* v. *Burchfield*, 87 F. Supp. 805 (E. D. Tenn.); *United States* v. *Horton*, 86 F. Supp. 92, 97–98 (W. D. Mich.); *United States* v. *Jackson*, 149 F. Supp. 937 (D. D. C.), reversed on other grounds, 250 F. 2d 772; *United States* v. *Jackson*, 159 F. Supp. 845 (D. D. C.).[4]

While, in most of the cases, hearsay was considered together with other information possessed by law-enforcement officers, the fact that hearsay was considered at all on the issue of probable cause stands as a flat rejection of the doctrine that hearsay rules applicable to an adversary proceeding are also applicable to the present problem. As the Seventh Circuit pointed out in *United States* v. *Walker*, 246 F. 2d 519, 527:

> The technical rules of evidence regarding hearsay come into greater importance at a trial on the merits especially when jurors are participating. But in an instance of the type now be-

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[4] See also cases involving search: *Nichols* v. *United States*, 176 F. 2d 431 (C. A. 8) (search of moving vehicle without warrant); *Wyche* v. *United States*, 193 F. 2d 703 (C. A. D. C.) (search warrant), certiorari denied, 342 U. S. 943; *United States* v. *Guido*, 251 F. 2d 1 (C. A. 7) (search warrant), certiorari denied, 356 U. S. 950; *United States* v. *McCall*, 243 F. 2d 858 (C. A. 10) (search of moving vehicle without warrant); *Washington* v. *United States*, 202 F. 2d 214 (search warrant), certiorari denied, 345 U. S. 956; *Gilliam* v. *United States*, 189 F. 2d 321 (C. A. 6) (search of moving vehicle); *United States* v. *Schwartz*, 151 F. Supp. 399 (W. D. Pa.) (search warrant).

> fore us strict application of the hearsay rule is a sterile technicality if not an incorrect application of the exclusionary rule.

See, similarly, *United States* v. *Bianco*, 189 F. 2d 716, 720–721 (C. A. 3); *United States* v. *Heitner*, 149 F. 2d 105, 106–107 (C. A. 2), certiorari denied, *sub nom. Cryne* v. *United States*, 326 U. S. 727.

3. In analogous situations, this Court has recognized the use of hearsay in non-adversary proceedings. In *Costello* v. *United States*, 350 U. S. 359, it affirmed a conviction deriving from an indictment returned by the grand jury solely on hearsay evidence, the Court pointing out that the grand jury is an institution "in which laymen conduct their inquiries unfettered by technical rules" (350 U. S. at 364). In *Nowak* v. *United States*, 356 U. S. 660, the Court held that a "good cause" affidavit accompanying the complaint in a denaturalization proceeding was sufficient where based upon official records of the Immigration and Naturalization Service, even though the affiant, a government attorney, had no personal knowledge of the facts alleged. See also *Maisenberg* v. *United States*, 356 U. S. 670, 672.

If a grand jury can indict on reliable hearsay as in *Costello*, or a good cause affidavit necessary to institute denaturalization proceedings can be issued on trustworthy second-hand information as in *Nowak*, then it follows, we believe, that probable cause to arrest may likewise derive from information imparted by a reliable informant. The crucial inquiry in any of these situations turns upon the reliability of the informant and the credibility of his information.

4. We do not suggest that officers may rely on unfounded gossip in enforcing the law. What we do say is that the quality of hearsay may vary greatly and that information which is reasonably believed to be reliable is not to be rejected simply because it is hearsay. The officers have the right to consider all information that they may have on the issue of probable cause and it is to the totality of that information, including hearsay, to which the test of reasonableness should be applied.

Significantly, the early cases which laid the foundation for the rule permitting an officer to arrest without a warrant, where he had probable cause to believe that a felony had been committed and that the person arrested had committed it, involved reliance upon hearsay. See, *e. g., Samuel* v. *Payne,* 1 Dougl. 359–360 (K. B. 1780); *Ledwith* v. *Catchpole,* Cald. 291, 293–295 (K. B. 1783); 2 Hale, *Pleas of The Crown,* 84–97, 90; 4 Blacksone *Commentaries,* 292–293. While at first the emphasis was placed upon the officer's carrying out his duty regardless of the quality of the information upon which he was acting, soon the test became the trustworthiness and reliability of such information. See, Hall, *Legal and Social Aspects of Arrest Without A Warrant,* 49 Harv. Law Rev. 566, 569, 574–577. Similarly, in the early American state cases the criterion was not whether the officer's information derived from another but whether he had reason to rely upon it. *Holley* v. *Mix,* 3 Wend. (N. Y.) 350–353 (1829); *Rohan* v. *Sawin,* 5 Cush. (Mass.) 281, 284 (1850); Wilgus, *Arrest Without A Warrant,* 22 Mich. L. Rev. 541, 673, 695–699.

This emphasis upon the *quality* of the second-hand information rather than its hearsay character has apparently been accepted by this Court. For in both the *Carroll* and *Brinegar* cases, these early cases have been, at least implicitly, approved. In *Carroll* (267 U. S. 132, 161), the Court quoted with approval the following passage from *Commonwealth* v. *Carey*, 12 Cush. (Mass.) 246, 251 (1853): "but if he [a constable] suspects one on his own knowledge of facts, *or on facts communicated to him by others*, and thereupon he has reasonable ground to believe that the accused has been guilty of felony, the arrest is not unlawful" (emphasis added), citing, *inter alia*, for like definitions of probable cause, *Rohan* v. *Sawin*, *supra*, and *McCarthy* v. *De Armit*, 99 Pa. St. 63. In the *McCarthy* case, the Supreme Court of Pennsylvania said on the question of probable cause (99 Pa. St. at 69):

> The substance of all the definitions is a reasonable ground for belief of guilt. Representations of others may be an adequate foundation for it, especially if made by those who have had opportunities for knowledge, or who have made investigation * * *.

Again, the Court in *Carroll* (267 U. S. at 157) relied on the *Rohan* case for the further proposition that arrest without a warrant was justified upon "a reliable report of a felony". In *Rohan*, the following is quoted with approval from Hale, *Pleas to The Crown* (5 Cush. 284):

> If a felony be committed, and A. acquaint the constable that B. did it, the constable may take

him and imprison him, at least till he can bring him before some justice of the peace.

In *Brinegar* (338 U. S. at 175), the Court, noting that it had been approved in the *Carroll* opinion, quoted the *McCarthy* case for the proposition that probable cause "is a reasonable ground for belief of guilt".

We reiterate that we do not suggest that all second-hand information constitutes a proper basis for a finding of probable cause. On the contrary, we agree that some hearsay may be so untrustworthy that no reasonable action may be taken thereon. The crux of our position is that the nature and quality of the information under all the circumstances is the critical element, not any rigid formula of exclusion designed to meet the needs of an adversary proceeding.[5] On the one hand, for example, if an officer receives a tip from an anonymous informer incriminating another in the commission of a felony and without any independent investigation proceeds to arrest, the arrest might well be invalid. See *e. g.*, *Wrightson* v. *United States*, 222 F. 2d 556 (C. A. D. C.); *Contee* v. *United States*, 215 F. 2d 324, 327 (C. A. D. C.). On the other hand, where an officer receives information from

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[5] We have no quarrel with the cases relied upon by petitioner, if they turn on their own particular facts. Our quarrel is with an uncritical rejection of the use of hearsay without explanation, or on a theory applicable only to an adversary proceeding. Many of the cases petitioner cites rely upon the now discredited dictum of *Grau* v. *United States*, 287 U. S. 124, 128 (see *supra*, p. 12). *E. g.*, *Wakkuri* v. *United States*, 67 F. 2d 844 (C. A. 6); *United States* v. *Castle*, 138 F. Supp. 436 (D. D. C.); *Worthington* v. *United States*, 166 F. 2d 557 (C. A. 6).

a source of known reliability, the "practical considerations of everyday life" warrant reliance upon it. As Judge Learned Hand said in *United States* v. *Heitner*, 149 F. 2d 105, 106 (C. A. 2), certiorari denied *sub nom. Cryne* v. *United States*, 326 U. S. 727: "It is well settled that an arrest may be made upon hearsay evidence; and indeed, the 'reasonable cause' necessary to support an arrest cannot demand the same strictness of proof as the accused's guilt upon a trial, unless the powers of peace officers are to be so cut down that they cannot possibly perform their duties".*

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* In the *Heitner* case, the "hearsay" relied upon was a report to the arresting officer from his "precinct." The court did not, however, distinguish such information from equivalent information from any other reliable source, and held simply that that information, coupled with the facts directly observed by the arresting officer, was sufficient to give the officer "reasonable cause" to make the arrest. See also *Weise* v. *United States*, 251 F. 2d 867 (C. A. 9), certiorari denied, 357 U. S. 936; *Colorado* v. *Hutchinson*, 9 F. 2d 275, 276 (C. A. 8).

In *United States* v. *Bianco*, 189 F. 2d 716 (C. A. 3), relied upon by petitioner (Pet. Br. 8), the court did give a special effect to inter-agent communications by FBI agents. There, agent *A*, the arresting agent, had been told by agent *B* simply that agent *C* (p. 718) "had received reliable information that Bianco would take the 8:25 plane [from Baltimore to Pittsburgh and] that he had lottery materials with him." On that basis alone, agent *A* arrested Bianco when he arrived in Pittsburgh. The court, implying that what was known to agent *A* (merely a third or fourth-hand report from an unidentified source) was by itself insufficient to constitute probable cause, held that it was not restricted in determining probable cause to the information that had been communicated to agent *A* but that it could also consider the facts known to *C* but not communicated to *A*. It thought such attribution of knowledge to be appropriate because of the necessity of summary inter-agent communications in view of the size and character of the FBI. As

In the first *Wrightson* case, cited by petitioner, the Court of Appeals for the District of Columbia Circuit rejected as insufficient to show probable cause evidence which revealed no more than that the arresting officer was acting on an anonymous tip. *Wrightson* v. *United States*, 222 F. 2d 556. However, when, at the subsequent trial, the arresting officer testified that he had been investigating the robbery for some days and that the information incriminating Wrightson came from "an informer whom he knew, and in whom he had confidence" the court of appeals affirmed the second conviction on the ground that there was probable cause to arrest. 236 F. 2d 672, 673. Here again, the approach focused upon the reliability of the information. That it was hearsay meant only that it was sub-

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the other side of the coin, it followed that the inter-agent communication could have no independent effect apart from the knowledge on which it was based (and which, under the court's theory, was attributed to the arresting officer) and hence it was necessary that the knowledge of agent *C* be scrutinized to determine if it constituted probable cause, which the court held it did. It is clear that this analysis was based on the agency relationship among fellow FBI agents and has no application to information received from an independent source. In such a case, it would seem that the only question is whether the information actually communicated to the arresting officer supported the finding of probable cause and that any information known to the informant but not communicated would be of no avail. Contrariwise, since it is only the communication itself that is relevant, the basis for the informant's knowledge is not directly in issue (though, of course, the extent to which the informant disclosed the basis of his information would affect the weight that could reasonably be given to it). This distinction is recognized in the *Bianco* case itself, where the court considered, as supporting the finding of probable cause, information given to agent *C* by an informant even though there was no proof of the basis for the informant's knowledge.

ject to scrutiny for reliability. But once it had passed muster, it was to be considered on the issue of probable cause just as any other facts and circumstances of the case. See *United States* v. *Gowen,* 40 F. 2d 593, 596 (C. A. 2), reversed on other grounds, *sub nom. Go-Bart Co.* v. *United States,* 282 U. S. 344 (Swan, J.: "It is urged that the 'probable cause' which will justify arrest of a felon must be founded on more than unsworn hearsay. But neither in reason nor upon the authorities is the rule so limited; rather, the test is whether the belief is reasonable"). See also *United States* v. *Li Fat Tong,* 152 F. 2d 650, 652 (C. A. 2); *King* v. *United States,* 1 F. 2d 931 (C. A. 9); *Cannon* v. *United States,* 158 F. 2d 952, 954 (C. A. 5), certiorari denied, 330 U. S. 839; *Mueller* v. *Powell,* 203 F. 2d 797, 802–803 (C. A. 8); *United States* v. *Walker,* 246 F. 2d 519, 527 (C. A. 7); *United States* v. *Jackson,* 149 F. Supp. 937, 939 (D. D. C.), reversed on other grounds, 250 F. 2d 772 (C. A. D. C.); *United States* v. *Jackson,* 159 F. Supp. 845, 846 (D. D. C.); *Ard* v. *United States,* 54 F. 2d 358, 359 (C. A. 5), certiorari denied, 285 U. S. 550; cf. *Husty* v. *United States,* 282 U. S. 694.

5. In most cases in which hearsay is involved, the issue of probable cause does not turn solely upon the second-hand information. If the information from a source of known reliability pinpoints with accuracy a particular individual as the perpetrator of a past felony, we believe that it, standing alone, will constitute probable cause. In most cases, however, there are numerous component factors considered together with the hearsay information and it is the combination

of all of the factors which actually decides the issue of probable cause. Pertinent may be the identity of the informer, the nature of the offense, the place and time of arrest or of the search, corroboration, attempted or possible, and the existence of additional information which tends to verify or cast doubt on the informer's story.

(*a*) *The locus of arrest.*—If arrest or search occurs in the privacy of a defendant's dwelling, more stringent standards of reasonableness may be imposed. See *Harris* v. *United States,* 331 U. S. 145, 151, n. 15; *Davis* v. *United States,* 328 U. S. 582, 593; *Carroll* v. *United States,* 267 U. S. 132, 153.

As Judge Learned Hand has noted, confidential information that would support the search of a car might not support the search of a building. *Somer* v. *United States,* 138 F. 2d 790, 791 (C. A. 2). On this same rationale, facts which support the arrest of a person in a public place might be deemed insufficient to justify an arrest in a home. Thus, *Worthington* v. *United States,* 166 F. 2d 557 (C. A. 6), which uncritically rejected consideration of hearsay, apparently under any circumstances, actually involved an arrest of defendant in her home followed by a four-hour search, deriving from an anonymous uncorroborated tip.[1] It was thereafter limited to its own facts by the

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[1] In *United States* v. *Castle,* 138 F. Supp. 436 (D. D. C.), entry into the defendant's home was gained by subterfuge; in *United States* v. *Tom Yu,* 1 F. Supp. 357 (D. Ariz.), and *United States* v. *Lassoff,* 147 F. Supp. 944 (E. D. Ky.), by force; and in *United States* v. *Vleck,* 17 F. Supp. 110 (D. Nebr.), as an excuse to make a search without warrant. On the other hand, in cases not involving the invasion of the home, the

Sixth Circuit in *Browner* v. *United States*, 215 F. 2d 753; cf. *Mueller* v. *Powell*, 203 F. 2d 797, 802–803 (C. A. 8).

(*b*) *The informer's identity.*—Second-hand information may be rejected where the information relied upon is an "anonymous tip".[8] Courts have also required considerable corroboration where the informer's identity is not revealed to the accused, although known by the law enforcement officer. See *Roviaro* v. *United States*, 353 U. S. 53, 61, where this Court noted:

> Most of the federal cases involving this limitation on the scope of the informer's privilege [disclosure of informant's identity] have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the

courts seem ready to accept the use of hearsay on the issue of probable cause. See, *e. g.*, *Husty* v. *United States*, 282 U. S. 694; *Cannon* v. *United States*, 158 F. 2d 952, 954 (C. A. 5), certiorari denied, 330 U. S. 839 (moving vehicle); *United States* v. *One 1946 Plymouth Sedan*, 167 F. 2d 3 (C. A. 7) (moving vehicle); *Coupe* v. *United States*, 113 F. 2d 145, 147–148 (C. A. D. C.), certiorari denied, 310 U. S. 651 (moving vehicle); *United States* v. *Walker*, 246 F. 2d 519 (C. A. 7) (arrest and search of moving vehicle); *United States* v. *Kancso*, 252 F. 2d 220 (C. A. 2) (arrest as defendant left subway station).

[8] *E. g.*, *Contee* v. *United States*, 215 F. 2d 324, 327 (C. A. D. C.) ("An uncorroborated tip by an informer whose identity and reliability are both unknown does not constitute probable cause to make an arrest"); see also *Brown* v. *United States*, 4 F. 2d 246 (C. A. 9).

formant unless there was sufficient evidence
art from his confidential communication.

Scher v. *United States*, 305 U. S. 251, the
oided justifying the defendant's arrest and
h of a moving vehicle upon "confidential in-
n", relying instead upon information adduced
fficers through their own senses. The Court
to consider the hearsay because the defend-
uest to learn the name of the informer was
by the trial judge.[9] See also *McQuaid* v.
States, 198 F. 2d 987, 989 (C. A. D. C.), cer-
enied, 344 U. S. 929; *United States* v. *Blich*,
627 (D. Wyo.); cf. *Wisniewski* v. *United*
7 F 2d 825, 826 (C. A. 6).

orroboration.—In the usual case, second-hand
tion is viewed together with information
he law-enforcement officer has on his own
ge. Such personal verification would appear
a twofold effect. It tends to strengthen and
ate the leads obtained, and reflects the officer's
th in obtaining as much information as pos-
fore taking an individual into custody or in-
a search. Even if what the officer sees, if

[9] Discussing the *Scher* case, Judge Learned Hand ob-
United States v. *Heitner*, *supra*, 149 F. 2d at 107):
e trial court had ruled out some questions designed to
sources of the information on which the officers had
d the court, recognizing the propriety of the inquiry,
d upon to justify the arrest upon the ground that it
depended, or at least need not have depended, 'upon
bility of something told but upon what they saw and
hat took place in their presence'. In this there is no
n that 'something told' could not have furnished 'rea-
cause' for the arrest; indeed, the implication was
the contrary."

considered alone, might not amount to probable cause, it may take on added significance when coupled with the information given to him.

In *Husty* v. *United States*, 282 U. S. 694, the fact that the officers found the defendant's car as described at the place noted by the informer was held to give credence to the informer's story and thus establish probable cause. In *Christensen* v. *United States*, decided August 28, 1958, No. 1437 (C. A. D. C.), the officers had information that the defendant was selling narcotics at a particular place. Before arrest they investigated the "tip", found defendant at the place "in whispered conversation" and carrying a brown paper bag. In finding probable cause, the court observed (slip op., p. 2): "We cannot view the advance 'tip' information and the observations of the police detective in two separate, logic tight compartments. Neither one standing alone would constitute probable cause, but together they composed a picture meaningful to a trained, experienced observer."[10]

[10] See also *White* v. *United States*, 16 F. 2d 870, 871–872 (C. A. 9), certiorari denied, 274 U. S. 745 (arrest without warrant); *Bradford* v. *United States*, 194 F. 2d 168, 169 (C. A. 6) (arrest and search of moving vehicle without warrant); *Gilliam* v. *United States*, 189 F. 2d 321, 323 (C. A. 6) (search of moving vehicle); *King* v. *United States*, 1 F. 2d 931 (C. A. 9) (arrest and search of moving vehicle without warrant); *Browner* v. *United States*, 215 F. 2d 753 (C. A. 6) (arrest without a warrant); *Mills* v. *United States*, 196 F. 2d 600, 602 (C. A. D. C.), certiorari denied, 344 U. S. 826 (arrest without a warrant). Lack of corroboration was obviously a factor for rejecting the second-hand information in *United States* v. *Baldocci*, 42 F. 2d 567 (S. D. Cal.); *United States* v. *Hill*, 114 F. Supp. 441 (D. D. C.); *United States* v. *Clark*, 29 F. Supp. 138 (W. D. Mo.); *United States* v. *Tom Yu*, 1 F. Supp. 357 (D. Ariz.).

Logic dictates that the more summary, general, or otherwise doubtful the second-hand information, the greater the need for personal investigation and corroboration by the law-enforcement official, particularly where the arrest or search occurs in a private dwelling. By the same token, the more cogent and reliable the tip, the less the corroboration needed. That no ready rule of thumb is discernible from the cases is only further evidence that each case presents its special facts and problems which must be dealt with before the issue of probable cause can be resolved. The sum of it is that "probable cause" is a practical decision involving numerous components to be evaluated against the circumstances of each case, and not a mathematical formula subject to easy definition and application.

II

THE INFORMATION FURNISHED BY HEREFORD, AN INFORMER OF PROVEN RELIABILITY, COUPLED WITH THE CORROBORATING FACTS PERSONALLY OBSERVED BY THE ARRESTING AGENT, CONSTITUTED PROBABLE CAUSE TO ARREST

We have shown in Point I that the information related to Agent Marsh by informer Hereford was entitled to consideration on the issue of probable cause. All that remains is the essentially factual question whether under all the facts and circumstances of this case, including but not limited to that information, Agent Marsh had probable cause to believe that petitioner had committed a felony. After reviewing the evidence in detail, both courts below held that he did.

That concurrent finding of both courts below is entitled to great weight, and we submit that their appraisal of the evidence cannot be said to be erroneous.

1. As the Statement shows (*supra*, p. 3), Agent Marsh received information from special employee Hereford that petitioner was peddling heroin. A few days later, Hereford informed Marsh that petitioner had gone to Chicago to obtain three ounces of heroin and would return with the heroin on the morning train on the next or the following day. He gave Marsh detailed data concerning petitioner's race, age, appearance, clothing and manner of gait and further informed the agent that petitioner would be carrying a tan zipper bag. Marsh, who had 29 years of experience as a narcotics agent, had received information from Hereford in the past and without exception had found him to be reliable. Having no reason to doubt him on this occasion, he put the information given him to the test of investigation, placing the incoming trains from Chicago on the two mornings indicated under close surveillance. On the second morning, a person walking quickly and fitting in precise detail Hereford's description of petitioner alighted from the Chicago train. Having thus verified that petitioner had indeed been to and returned from Chicago, in exact conformity with the plan related by Hereford, Agent Marsh proceeded to arrest petitioner. In response to Marsh's inquiry, petitioner gave a fictitious name, but examination of his billfold confirmed his identification as the petitioner. The ensuing search revealed two ounces of heroin clasped in his left hand and a hypodermic syringe in his tan travelling bag.

We believe that, viewed in totality, these facts provided Agent Marsh with "reasonable grounds" [11] to arrest.

2. Petitioner contends (Pet. Br. p. 7) that Agent Marsh could not have obtained a warrant of arrest on the information he received from Hereford and consequently that the arrest without a warrant was invalid. If petitioner means that the agent could not then have acted upon Hereford's information without any attempt at corroboration, we might well agree. That, however, is not because the information was second-hand, but because it disclosed only a plan to commit a felony in the future. In such a case, despite the informer's reliability, some corroboration that the plan had been carried out would seem to be appropriate before undertaking to arrest.

The fact is, however, that Agent Marsh did not proceed to arrest solely upon Hereford's representations. On the contrary, in cooperation with local Denver police, he placed all incoming Chicago trains under close surveillance on the mornings when Hereford had said petitioner would return. The surveillance bore fruit and Marsh was able thereby personally to verify, to a great extent, Hereford's allegations. Thus Marsh confirmed, through personal observation, Hereford's report that petitioner had been in Chicago, and the date, time and method of his return to Denver.

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[11] 26 U. S. C. 7607, *supra*, p. 2, authorizes an arrest without a warrant when there are "reasonable grounds" to believe that the person arrested has violated the federal narcotic laws. This standard is the same as probable cause. See *United States* v. *Valker*, 246 F. 2d 519, 526 (C. A. 7).

He observed further that Hereford was correct to the last detail concerning petitioner's appearance, attire, and mode of walking.

This information, gained by Marsh's personal observation, was important for two reasons. First, by confirming both Hereford's detailed description of petitioner and his attire and Hereford's statement that petitioner would be on the train from Chicago on the particular morning, it showed that Hereford had intimate and accurate knowledge of petitioner's habits and activities, and hence added great weight—in terms both of credibility and of accuracy—to the rest of the information supplied by Hereford. Second, the fact that petitioner returned from Chicago precisely in accordance with the plan reported by Hereford supported the inference that the plan had indeed been carried out and that petitioner had with him the heroin that he had gone to Chicago to obtain. It was on the basis of this corroboration of Hereford's statement, as well as the proven reliability of Hereford on past occasions—not, as petitioner would have it, solely on the basis of Hereford's statement standing by itself—that Agent Marsh concluded that there was probable cause to believe that petitioner was illegally possessed of narcotics. Even if that conclusion had proved to be mistaken, which it did not, we submit that the mistake would have been that of a reasonable man "acting on facts leading sensibly to * * * conclusions of probability" (*Brinegar* v. *United States,* 338 U. S. 160, 176), and not that of an overzealous officer acting on mere suspicion.

3. Petitioner further objects to the failure of the Government to show the basis for the information supplied by Hereford or to show that Hereford had told Marsh the basis for his statements. It is true that, at the hearing on the motion to suppress, Agent Marsh testified only that he had "received information" from Hereford that petitioner was peddling heroin and had gone to Chicago to obtain a further supply (R. 8), and did not testify as to what that "information" consisted of. Neither government counsel nor petitioner's counsel asked Marsh what, if anything, Hereford told him of the facts on which he based that information. The reason no doubt was that the petitioner did not contend at the hearing that the basis for the informant's conclusions was inadequate but argued only that the report, whatever its basis, was mere hearsay and could not support a finding of probable cause. Thus on cross-examination of Marsh, petitioner's counsel sought to show only that Marsh had no information other than that given him by Hereford and did not question what facts Hereford's information was based on (R. 11). It may be, however, that that failure does not preclude petitioner from making the argument here and that, if such additional proof were essential, it would be appropriate to remand the case for a further hearing on that issue, either separately or as an incident to a new trial. But in our view such direct proof of the basis for Hereford's information was not essential and the reliability of Hereford's information was more than adequately established by other proof.

Conclusory information from an informant, stand-

ing alone, might not be adequate, in certain circumstances, to support a finding of probable cause, especially if there is no test available of the validity of the informant's inferences from the observed facts. Proof of the basis for an informant's conclusions is not, however, the only way in which the validity of those conclusions can be verified. The consistent accuracy of the informant's reports in the past may give added weight to a report that could not be relied upon if made by an untested informant. Even better, crucial elements of the report can sometimes be verified by direct observation.

In this case, both types of confirmation were present. Agent Marsh testified that he had personally investigated prior information furnished by Hereford and invariably found it to be reliable. In addition, his personal observation of petitioner arriving by train from Chicago, exactly as Hereford had said he would, not only proved that Hereford did indeed have detailed and accurate knowledge of petitioner's activities but also corroborated the execution of the plan related by Hereford. While there was, of course, no direct corroboration of the purpose of petitioner's trip to Chicago, the confirmed accuracy of Hereford's report in all other respects made his statement of the purpose sufficiently reliable to constitute probable cause. That is, from the proven facts that Hereford knew that petitioner had gone to Chicago, knew when he would return, and knew what he would be wearing, it was reasonable for Marsh to infer that Hereford also knew, as he claimed, why petitioner had gone to Chicago. If anything, this direct confirmation of the

accuracy of Hereford's information was even more cogent and persuasive proof of its reliability than evidence of the source of that information would have been.

In *Browner* v. *United States*, 215 F. 2d 753 (C. A. 6), the informer advised the government agents that the defendant would be at his house that night to sell him narcotics. At the time designated, the officers observed two persons entering the informer's house answering the description given them, and proceeded to arrest. In upholding the arrest, the court said (p. 753): "The information received by the agents from the informer did not of itself warrant the arrest; but when the defendants appeared at the home of the informer at approximately the time agreed upon and answered the description given to the agents, it imparted verity to the information received." See also *United States* v. *Li Fat Tong*, 152 F. 2d 650 (C. A. 2); *United States* v. *Jackson*, 149 F. Supp. 937 (D. D. C.), reversed on other grounds, 250 F. 2d 772 (C. A. D. C.). So here, even though receipt of the reliable information alone may not have justified arrest, its corroboration to the extent possible gave the arresting officer probable cause to arrest.

4. In judging the reasonableness of Agent Marsh's action, the circumstances under which the arrest was made and the practical necessities of the moment are also relevant. The arrest occurred in the daylight in a public place while petitioner was quickly leaving. There was no entry into petitioner's home nor onto his premises. Petitioner was reasonably believed to have on his person, at that very moment, several

ounces of heroin, contained in a small package that could be readily passed on or destroyed, should the slightest suspicion be aroused. To have delayed action would have created a grave danger that the heroin would either be disposed of or secreted—or be distributed to users. In these circumstances, Marsh's action, based upon reliable information that he had personally confirmed in numerous respects, cannot be said to have been unreasonable; it was rather a rational decision predicated upon the exigencies of the moment under a good faith belief in petitioner's probable guilt.

Nothing said in *Giordenello* v. *United States,* 357 U. S. 480, is inconsistent with this conclusion. There, the officer, seeking an arrest warrant, had filed a complaint with the United States Commissioner alleging simply that "on or about January 26, 1956, at Houston, Texas * * * Giordenello did receive * * * heroin hydrochloride with knowledge of unlawful importation; in violation of" 21 U. S. C. 174. This allegation—no more than a statement of the elements of the crime with no underlying facts or any showing of the nature of the officer's knowledge—was held to be inadequate to enable the Commissioner to determine whether there was probable cause to believe that the suspect had committed the alleged crime. Here, on the other hand, Agent Marsh testified not only that he had received the information from an informant of proven reliability but also that he had confirmed by personal observation a large part of the information given him. There is no similarity in the two cases.

5. From the foregoing we think it clear that, had

Agent Marsh appeared before a Commissioner—following his personal observation of petitioner's arrival on the Chicago train and his corroboration, to that extent, of Hereford's information—an arrest warrant would properly have issued. It follows that the arrest without a warrant on those same facts, expressly authorized by the statute (*supra*, p. 2), was valid even if the agent had had time to get a warrant. *Trupiano* v. *United States*, 334 U. S. 699, 705. Under the circumstances here, however, it is clear that Marsh did not have time to seek a warrant. As noted above, we do not claim that the agent had probable cause for an arrest prior to the time that he observed petitioner alighting from the Chicago train. At that time, petitioner, with the heroin he was believed to have in his possession, was hurriedly leaving the train station. Narcotics may be easily secreted and, where deemed necessary, quickly destroyed. As the Second Circuit observed in *United States* v. *Kancso* (252 F. 2d 220, 222):

> Standards which might be reasonable for the apprehension of bank robbers might not be reasonable for the arrest of narcotics pedlers. Large quantities of heroin can be transported in very small packages and, even as here, on a person without physical detection. These drugs are passed through the community by stealth. If narcotics agents are to enforce the laws which Congress enacts for the protection of the public, they may well have to depend upon informers, undercover agents, special employees and their own knowledge of the underworld obtained from years of experience.

The legislative history of the Narcotic Control Act of 1956 makes clear that Congress was seriously concerned with the need for narcotics agents to act immediately to combat this illicit traffic. It was for this reason that the law specifically granted the agents the authority to arrest without a warrant, on probable cause. As the House Report points out (H. Rep. No. 2388, 84th Cong., 2d Sess., p. 10):

> The enforcement officers have been required to secure an arrest warrant or a search warrant, even though circumstances indicate the impracticability of such a procedure. The delay involved in obtaining a warrant permits the destruction or removal of the narcotic evidence and allows the narcotic traffickers to escape prosecution for their crime. These and other restrictions on enforcement officers leave the public unprotected and give narcotic violators, especially the more reprehensible, larger racketeers and wholesalers, an advantage over law-enforcement officers in their efforts to combat the illicit narcotic traffic.

See also *id.* at p. 62; S. Rep. No. 1997, 84th Cong., 2d Sess., p. 11.

The agents here acted in compliance with the mandate given to them by Congress within the limitations imposed by the Fourth Amendment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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